Mutua v Triple Edge Media Limited (Cause 144 of 2019) [2023] KEELRC 3298 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3298 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 144 OF 2019

JK GAKERI, J

DECEMBER 18, 2023

BETWEEN

KENNETH KIMATHI MUTUA .... CLAIMANT

AND

TRIPLE EDGE MEDIA LIMITED .... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 6th March, 2019 alleging constructive termination and unpaid salary arrears.
2. The Claimant avers that he was employed by the Respondent effective 1st October, 2015 as Head of Production and Quality Assurance and resigned on 30th December, 2018.
3. That his net monthly salary was Kshs.400,000/= payable on the 28th day of every month and his duties were to ensure production of various TV shows for airing in media stations such as Inooro and Citizen TV, radios and Mass media and was in charge of a large team and served diligently and professionally.
4. That he won awards in 2016 and 2017 and the Respondent's revenues grew and his salary was paid to his bank account.
5. It is the Claimant's case that apart from October 2015, when his salary was paid in full, the Respondent paid only part of the salary or none at all upto January 2018, a total of Kshs.3,852,000.35.
6. That for the entire duration, he would have earned Kshs.13,400,000.00 less Kshs.2,200,000.00 for the vehicle he acquired and was thus owed Kshs.9,547,999.65 being the difference between what he ought to have earned and what was actually paid.
7. It is the Claimant's case that in the course of his employment, the Respondent facilitated his acquisition of a motor vehicle from Toyota Tshusho Ltd at Kshs.2.2 million after it paid a deposit of Kshs.535,000/= under the loan agreement and would deduct Kshs.125,000/= per month but did not do so as

agreed as the Claimant learnt later that the Respondent was remitting Kshs.45,000/= in lieu of Kshs.125,000.00 and as at February 2019, a balance of Kshs.560,000/= was outstanding yet the total amount due on the vehicle had been deducted from the Claimant's salary by 2016 raising his claim to Kshs.10,107,999.65 and the vehicle was repossessed by the company.

8. The Claimant alleges that he was not paid a house allowance.

9. That sometime in 2016, the Respondent unilaterally altered the terms of the employment contract and reduced the Claimant's salary.

10. That owing to the Respondent's failure to honour its part of the bargain, the Claimant resigned in December 2018 after having indicated the same by letter dated 4th October, 2018 and instructed counsel immediately thereafter as evidenced by the demand letter dated 4th January, 2019.

11. The Claimant prays for;

    i. General damages for constructive termination.

    ii. Withheld salary and unremitted loan of Kshs.10,107,999.65.

    iii. Unpaid house allowance at 15% for 39 months.

    iv. Costs of this suit.

    v. Interest on (i), (ii) and (iii) above at court rate.

    vi. Certificate of service.

    vii. Any other or further relief as the court may deem fit to grant.

Respondent's case

12. By its Memorandum of Response filed on 13th August, 2019, the Respondent admits that the Claimant was its employee and was to oversee specific shows, namely; Gaterina, Haiyaiya, Njuka Kahora and Micii Mithaka at Inooro TV.

13. It is the Respondent's case that its contract with the Royal Media Services was frustrated after the shows were terminated.

14. That the Claimant's gross salary was Kshs.400,000/= inclusive of house allowance and was paid dutifully as evidenced by payment slips, cheques and MPESA statements.

15. It is the Respondent's case that it entered into a contract with Tshusho Capital (K) Ltd to enable the Claimant secure a motor vehicle at Kshs.1,883,195.00 at 26.4% interest after payment of a deposit of Kshs.564,959.00 and the balance would be deducted from the Claimant's salary till payment in full.

16. The Respondent further avers that the Claimant's salary was reviewed on 8th June, 2016 after discussions with the directors due to the termination of the TV shows at the Royal Media Services Ltd and the Claimant was placed on a retainer of Kshs.130,000/= and consultancy fee was payable per project.

17. That the Claimant was paid all his dues to the final month, March 2017.

18. In his response to the Memorandum of Response, the Claimant admits that on 27th June, 21016, he was summoned to the Human Resource Manager's Office and shown a letter on the purported meeting which he contested by email.

19. The Claimant avers that the letter dated 30th June, 2016 was fabricated and denies that his contract was reviewed.

Claimant's evidence

20. The Claimant admitted that on 8th June, 2016, two directors of the Respondent called him to the Boardroom and informed him that they were experiencing cash flow challenges and it was difficult to meet all costs and he understood the situation owing to his relationship with the company. That there was no agreement to alter the terms of the contract of employment.

21. It was the Claimant's testimony that his stay at the Respondent was good and he served diligently.

22. That the letter from his advocate dated 4th October, 2018 was not responded to and he left owing to non-payment and lack of co-operation as he could not survive with unpaid rent, had no vehicle or money to feed his family of four.

23. That he was embarrassed and relocated to the village and has been jobless.

24. That the cash sent to him on MPESA was facilitation fees as Head of Production and Quality Control.

25. On cross-examination, the claimant confirmed that he had no account statement on the amounts received by the Respondent from the shows he produced.

26. That his salary was paid through his bank account not by Mpesa and had no record of the facilitation fees.

27. The witness admitted that the shows were cancelled and the Respondent lost revenue.

28. That he paid for the vehicle in one year but the Respondent paid for it in 4 years.

29. That the amount deducted was Kshs.2.2 million and the loan had a floating interest rate of 26.4% per year.

30. It was his evidence that he did other shows and was paid per programme and received the letter on salary review.

31. On re-examination, the Claimant testified that he did agree with the proposal to alter the terms of the contract of employment.

Respondent's evidence

32. Although the Respondent had lined up 3 witnesses and was accorded sufficient time to do so, it availed one witness only, its accountant, who joined the company in 2014.

33. He testified that the Claimant's salary was inclusive of house allowance and all his dues were paid.

34. That owing to the cancellation of the TV shows, the main revenue streams for the Respondent earnings reduced significantly.

35. On cross-examination, RWI confirmed that the Respondent paid for the motor vehicle until December 2019 and its documents were released in January 2021.

36. The witness admitted that in November and December 2015, the Claimant was paid Kshs.200,000.00 only.

37. The witness confirmed that the Respondent deducted the sum of Kshs.2.2 million in one year.

38. That the Respondent was deducting 5% withholding tax from the Claimant salary.

39. The witness admitted that he had no record of how production expenses were paid for as he had no petty cash vouchers.

40. That the Claimant produced other programmes such as IEBC and Unaitas Chama but could not testify on the revenue generated.

41. The witness confirmed that the Claimant did not acknowledge receipt of the letter on variation of terms having been dispatched on email but had no evidence that the letter was sent to the Claimant.

42. The witness testified that there was no other agreement on variation of the contract of employment apart from the letter from the Respondent.

43. The witness could not tell how much he had transferred to the Claimant on Mpesa but stated that it was intended to pay off his professional fees not facilitation for the productions.

44. The witness was cagey about the revenue generated by the projects on page 110, which he prepared.

45. It was his testimony that the professional fee paid to the Claimant was inclusive of house allowance.

46. The witness admitted that the Claimant's fee was Kshs.400,000/= per month but the contract was renewed.

47. On re-examination, the witness admitted that the contract between the Respondent and Tshusho Capital Ltd and the one between him and the Respondent were different.

48. It was his testimony that Mpesa transfers were payment of the Claimant's fees as production expenses were payable in cash.

Claimant's submissions

49. The Claimant's counsel submitted on frustration of the employment contract, alterations of terms of the employment contract, constructive dismissal and reliefs.

50. On the first issue, reliance was made on the sentiments of the court in Kenya Airways Ltd V Satwant Singh Flora (2013) eKLR to urge that there was no radical difference between the contract undertaken and what materialised.

51. Counsel urged that the contract between the parties was not frustrated.

52. As to whether the terms of the contract were altered, counsel submitted that since the alteration was not mutually agreed, the variation was invalid and amounted to a breach of the employment contract.

53. As regards constructive dismissal, counsel submitted that the fact that the Respondent unilaterally altered and breached the contract of employment to the detriment of the Claimant, it committed a fundamental breach of the contract and led to the claimant's resignation.

54. Reliance was made on the sentiments of the court in Mkala Chitavi V Malindi Water & Sewerage Co. Ltd as well as Aleper & another V Lodwar Water and Sanitation Co. Ltd (2015) eKLR to reinforce the submission.

55. On the reliefs sought, counsel urged that the Claimant was entitled to 12 months' salary at Kshs.4,800,000/=, unpaid deductions, house allowance under Section 31 of the *Employment Act*, 2007 and a certificate of service.

56. The Respondent did not file submissions.

Determination

57. The issues that commend themselves for determination are:-

    i. Whether the Claimant was an employee of the Respondent or a consultant.

    ii. Whether the Claimant's employment was constructively terminated.

    iii. Whether the Claimant is entitled to the reliefs sought.

58. Contract of service or contract for service? This is what the court must determine in the 1st issue.

59. The preamble, to the offer letter dated 29th September, 2015 states that the Respondent was offering the Claimant consultancy services from October 1st 2015 and the agreement would be subject to continuous review conducted by the directors and the Respondent would provide all materials and equipment and a professional fee of Kshs.400,000/= would be paid monthly.

60. The contract was terminable by one month's notice of either party or pay in lieu of notice.

61. Finally, variation of the agreement would be by an advance agreement between the parties in writing.

62. Significantly, the agreement between the parties had no fixed duration, an attribute of an employment contract.

63. In his memorandum of Claim, the Claimant states that he was employed by the Respondent as Head of Production and Quality Control and the relationship commenced on 1st October, 2015.

64. In its Memorandum of Response, the Respondent admitted the Claimant's averments in paragraph 3 and 4 of the Memorandum of Claim.

65. Section 2 of the *Employment Act*, 2007 defines employee as "a person employed for wages or a salary and includes an apprentice and indentured learner."

66. The section defines the term employer in a broad sense as it means any person, public body, firm, corporation or company and includes the agent, foreman, Manager or factor of such person.

67. Similarly, Section 2 of the Act defines the phrase contract of service is a fairly wide sense. It is an oral or written express or implied agreement to employ or to serve as an employee for a period of time.

68. In *Ontario V Sagaz Industries Canada Inc* (2001) SCC 59, Jordon and *Harisson Ltd V McDonald and Evans* (1952) 1 TLR 101 (UK) and *Ready Mixed Concrete (South East) Ltd V Minister of Pensions and National Insurance* (1968) 2 QB 497 among others, courts addressed the parameters a court ought to consider in determining whether a person is an employee or not.

69. Courts have applied various tests over the years such as the control test and integration tests.

70. In the latter, the salient issue is whether the service rendered by the person are an integral part of the business.

71. In the instant suit, the Respondent offered to engage the Claimant as Head of Production and Quality Control of the Respondent and the Claimant to serve in that role and there was no indication that the Respondent engaged the Claimant as a consultant or other role other than an employee.

72. For the foregoing reasons, it is the finding of the court that the Claimant was an employee of the Respondent.

73. As to whether the Claimant's employment was constructively terminated, the court proceeds as follows;

74. The locus classicus articulation of the principle of constructive dismissal are the celebrated words of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (1978) QB 761 as follows;

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

75. The principle of constructive dismissal was domesticated by the Court of Appeal in its decision in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR where the court affirmed the contractual test approach as follows;

> "The second construction is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment – this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in Western Excavating (ECC) Ltd V Sharp (1978) 1CR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of the mixed fact and law. The criterion for evaluating the employer's conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory. The employee must be able to show that he left in response to the employer's conduct (i.e causal link must be shown i.e the test is causation)."

76. The Court of Appeal went further and formulated the guiding principles relevant in determining constructive dismissal.

77. These include, the fundamental or essential terms of the contract of employment, whether there is a repudiatory breach, whether the conduct of the employer is fundamental and goes to the root of the contract, causal link between the employer's conduct and termination of the contract, employer's conduct was the effective cause, whether or not notice was given, employee must not have accepted, waived or acquiesced or conducted himself to be estopped from asserting the repudiatory breach and must have acted within a reasonable time of the breach and burden of proof by the employee.

78. The court is bound and guided by the foregoing test and guiding principles.

79. In the instant case, the Claimant relies on a complement of the employer's acts or omissions as the proximate cause of his resignation on 30th December, 2018.

80. These are;

i. Non-payment of full salary or none at all from 2015.

ii. Breach of the borrowing agreement by non-remission of total deductions to Tshusho Capital ltd.

iii. Unilateral change of the terms of the contract.

iv. Refusal by the Respondent to respond to the Claimant's advocate letter dated 4th October, 2018.

81. The foregoing reasons are discernible from the Claimant's witness statement, oral testimony and letters dated 4th October, 2018 and 4th January, 2019 from Munyasya & Company Advocates and CK Nyoro & Co. Advocates respectively.

82. As regards non-payment or part payment of salary, the Claimant identifies 20 months when his salary was not paid in full and omits the months when he was presumably not paid such as November 2015, January 2016, September 2016 and December 2016, January, February, August, September and November 2017 and January 2018.

83. Although RWI confirmed that he paid the Claimant's fees as and when it fell due, and nothing was owing, he adduced no documentary evidence of the alleged payments other than stating that the payment were effected through the Claimant's bank account and MPESA.

84. Admittedly, monies were transferred to the Claimant at different times which is not contested.

85. Regrettably, the Respondent could not establish how much it paid the Claimant through his bank account, Mpesa or by cheque.

86. In April 2016 for instance, the Respondent paid the Claimant Kshs.250,000/= as reflected in the Claimant's Memorandum of Claim.

87. The deduction of Kshs.150,000/= perhaps was meant for the car loan repayment.

88. As regards Mpesa payments, the Claimant explained that the payments were production expenses of the shows and although RWI testified that it was the Claimant's professional fee, he tendered no evidence to show that he paid for such expenses in cash as he alleged.

89. The Claimant's bank account at the Co-operative Bank tends credence to his testimony that part of the monies received was meant to cater for expenses. For instance in October 2015, the Claimant received a total of Kshs.500,000/=, Kshs.100,000/= on the date he commenced his engagement and Kshs.400,000/= at the end of the month on 30th October, 2015.

90. In sum, the Respondent was unable to prove how much it paid the Claimant through Mpesa and when it was sent to him.

91. On contrary, the Claimant's bank statements reflect the respective amounts deposited in his account.

92. According to the Claimant, payment of partial or no salary started in 2015 and persisted until he resigned more than 3 years later.

93. On breach of the borrowing agreement, the Claimant testified that while he paid for the motor vehicle in one (1) year and RWI confirmed as much, the Respondent paid the loan in 4 years and deducting Kshs.125,000/= per month but remitting Kshs.45,163/=to the lender.

94. Documentary evidence on record reveals that the loan agreement between the Respondent and Tshusho Capital Kenya Ltd was entered into on 25th November, 2015 and the Claimant requested for a mini statement on 7th November, 2016 and the same was availed on 17th November, 2016 by Mr. Joel Chebon and the outstanding balance was Kshs.516,500.00.

95. There is no evidence of follow up until 25th June, 2018, almost 6 months after the Claimant had left employment.

96. As regards the unilateral variation of the contract of employment, it is not in dispute that by letter dated 30th June, 2016, the Respondent reviewed the Claimant's remuneration as follows;Kshs.206,000.00 net (shoot and complete production of 13 episodes of Gaterina.Kshs.130,000/= net retainer.A per project rate will be determined for future projects.

97. The letter makes reference to discussions held on 8th June, 2016.

98. Although the Claimant initially denied knowledge of the letter dated 30th June, 2016, he admitted in his evidence in chief that he had met 2 directors of the Respondent on 8th June, 2016 who informed him of the challenges in the cash flow the Respondent was grappling with.

99. On cross-examination, the Claimant admitted that he received the letter but was less than candid on the contents of the discussions.

100. The witness also admitted that owing to the relationship he had with the Respondent and its directors, he offered to understand the situation as cash flow normalised.

101. Relatedly, the Claimant was also aware that the shows identified in his job description as immediate had been discontinued by the TV company.

102. The Claimant was fully aware that the Respondent's financial fortune was not as it was when he joined in October 2015.

103. The foregoing notwithstanding the provisions of Section 10(5) of the *Employment Act*, 2007 are emphatic that;

> " Where any matter stipulated in sub-section (1) changes, the employer shall in consultation with the employee revise the contract to reflect the changes and notify the employee of the change in writing."

104. Although, Section 10(5) of the *Employment Act*, 2007 does not expressly require the employee's concurrence for a variation of the terms of the contract, it is an imperative by its very nature as a contract of employment.

105. It is an implied term of contract that any change, alteration or variation ought to be consensual and thus a unilateral variation or modification is untenable.

106. In this case, the contract of employment was explicit that the terms of employment could be varied or modified or changed as follows;

> " This agreement may be varied by advance agreement in writing between the parties."

107. Neither of the parties provided a copy of the requisite agreement.

108. The Claimant denied having entered into any agreement with the Respondent to change the terms of the contact of engagement and RWI confirmed as much on cross-examination.

109. Thus, the Respondent purported to vary the terms of engagement outside the terms of the contract between the parties and thus without the Claimant's consent.

110. Records reveal that after June, 2016, the amount paid to the Claimant reduced to Kshs.130,000/=, the net retainer fee as per the letter dated 30th June, 2016 and to as low as Kshs.50,000/= in November 2016 but rose to Kshs.365,000/= in March 2017 and Kshs.329,500.00 in June 2017 and Kshs.300,000/= in July 2017.

111. Instructively, the Claimant provided no documentary evidence of any protest or objection for the reduction of the amount paid per month.

112. Although the terms of the contract between the parties were not followed, the Claimant was aware of the situation and did not contest the reduction in his professional fees.

113. In equity, the Claimant is estopped from asserting that his professional fee was different under the doctrine of equitable or promissory estoppel as explained by Denning L.J. in *Combe V Combe* (1951) 2 KB 215 as follows;

> "The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by consideration but only by his word."

114. According to Denning L.J.

> "That principle (stated in the High Trees Case (1947) 1 KB 130) does not create new causes of action where non-existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties."

115. In *Carol Construction Engineers Ltd & another V National Bank of Kenya* (2020) eKLR, Joel Ngugi J. (as he then was) identified the elements of promissory estoppel as representation by word or conduct reasonableness, reliance by the representee, detriment by the representee or change in position and unconscionability for the representor to resile from the representation.

116. According to Judge,

> "The doctrine of equitable estoppel prevents a party from acting inconsistently with a promise that the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party's detriment."

117. In the court's view, the Claimant was aware of the alteration in the terms of engagement and by accepting the lesser amount from July 2016 through to December 2018, he, by conduct represented that he had accepted the status quo and never raised it until he left at the end of December 2018 as the letter dated 4th October, 2018 made no reference to any variation of the contract of engagement between the parties.

118. Having accepted the lesser remuneration and accepting payment per project for over one year and 6 months, the Claimant is by his conduct estopped from asserting that the relations between the parties was different and his remuneration ought to have been different as permitting him to do so would be inequitable to the Respondent which relied on the representation and changed its position.

119. Finally, as regards the Respondent's refusal to respond to the Claimant's counsel's letter dated 4th October, 2018, it is common ground that the letter was not responded to by the Respondent.

120. Evidently, responding to the letter was neither a term of the contract between the parties nor a fundamental term.

121. Equally, the Respondent's failure to remit the total amount it deducted from the Claimants professional fee was not a fundamental term of the contact of employment.

122. The only allegations that constituted fundamental terms of the contract and run to the root of the contract were the non-payment of or partial payment of remuneration and variation of the contract.

123. As adverted to elsewhere in this judgement, the partial or non-payment of salary started in 2015 according to the Claimant but he did not raise it or leave at the instance.

124. Similarly, the terms of the contract were varied in June 2016 and the reduced remuneration was paid from July 2016 and the Claimant did not leave or threaten to leave and did not until 30th December, 2018, about $2^1/2$ years later.

125. One of the guiding principles of constructive dismissal is that the employee is required to leave at the instance or within a reasonable time.

126. Did the Claimant do so?

127. The answer to this question is convincingly in the negative as $2^1/2$ years is not acting within a reasonable time.

128. Similarly, the other guiding principle is that the employee must neither accept the state of affairs, acquiesce, waive nor conduct himself or herself in a manner as to be estopped from asserting the repudiatory breach.

129. In the court's view, the Claimant ought to have left sometime in the 2nd half of 2016 owing to the persistent non-payment or underpayment and the variation of the terms of engagement, but he stayed on and accepted the reduced pay and testified that his stay at the Respondent's was good.

130. It requires no belabouring that Claimant accepted and acquiesced to the Respondent's conduct and is estopped from asserting that their engagement was different.

131. From the evidence before the court, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that his employment was constructively dismissed by the Respondent on 30th December, 2018 when he resigned.

132. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

(a) General damages

133. Having found that the Claimant has failed to demonstrate that he was constructively dismissed, the remedy of general damages herein claimed is unsustainable and even if the Claimant had discharged the burden of proof to the requisite standard, the appropriate relief would not be in the nature of general damages.

The prayer is declined.

(b) Withheld salary and unremitted loan

134. From the evidence on record, it is clear that part of the Claimant's salary is owing as not the entire Kshs.400,000/= was paid between October 2015 and June 30th 2016, for instance Kshs.375,000/= November 2015 salary, January 2016 Kshs.375,000/=, February 2016 Kshs.38,999.65, March 2016 Kshs.25,000/=, April 2016 Kshs.25,000/=, May 2016 Kshs.25,000/=, June 2016 Kshs.25,000/=.

135. From 1st July, 2016 to 30th December, 2018 any amount less than Kshs.130,000/= taking into account the car loan.

136. According to the Claimant, the professional fee for December 2016, Kshs.130,000/=, January and February 2017 Kshs.260,000/= as well as August and September Kshs.260,000/=. Finally, November 2017 Kshs.130,000/=.

137. Finally, since the Respondent deducted the sum of Kshs.2.2 million from the Claimant's salary for the motor vehicle, the Claimant is entitled to any unremitted sum as it is the Respondent's failure to do so that led to the repossession of the motor vehicle.

138. The Claimant is entitled to unremitted loan repayments, if any.

(c) Unpaid house allowance at 15% of gross salary for 39 months

139. Although the Claimant alleged that he was not paid a housing allowance, he did not adduce any evidence to establish what his basic or gross salary was. He did not produce a copy of his pay statement to demonstrate how much he was earning exclusive of the housing allowance prayed for.

140. Although it is the obligation of the employer to provide an itemised pay statement, it was the duty of the Claimant to prove the non-payment of housing allowance by availing evidence of his basic salary.

141. The amount specified in the contract of engagement is net of all deductions including tax.

142. So, what was the Claimant's basic salary or gross salary? The Claimant furnished no evidence.

143. Typically, house allowance is computed at 15% of the basic salary, not gross salary. (See Grain Pro Kenya Inc. Ltd V Andrew Waithaka Kiragu (2019) eKLR).

144. The court is not persuaded that the prayer for house allowance is sustainable and it is declined.

(d) Certificate of service

145. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

146. In the upshot, judgement is entered in favour of the Claimant against the Respondent in the following terms;

    a. The Claimant is awarded the unpaid salaries for the months tabulated herein below as follows;

        1. November 2015 Kshs.375,000.00

        2. January 2016 Kshs.375,000.00

        3. February 2016 Kshs.38,999.65

        4. March 2016 Kshs.25,000.00

5. April 2016 Kshs.25,000.00
6. May 2016 Kshs.25,000.00
7. June 2016 Kshs.25,000.00
8. From July – November 2016 Kshs.130,000.00

   Less Loan repayment (to be computed by counsels for adoption by the court)
9. December 2016 Kshs.130,000.00
10. January 2017 Kshs.130,000.00
11. February 2017 Kshs.130,000.00
12. August 2017 Kshs.130,000.00
13. September 2017 Kshs.130,000.00
14. November 2017 Kshs.130,000.00
15. Unremitted loan repayments (to be computed by counsels for adoption by the court).

b. Certificate of service to issue to the Claimant within 30 days.

c. Costs of this suit.

d. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF DECEMBER 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