



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bunyi v Saab Kenya Limited (Cause 989 of 2017)  
[2023] KEELRC 3238 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3238 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 989 OF 2017  
JK GAKERI, J  
DECEMBER 7, 2023**

**BETWEEN**

**EDWARD BUNYI ..... CLAIMANT**

**AND**

**SAAB KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim praying for gratuity, overtime, payment in lieu of annual leave and pay in lieu of sick leave.
2. The Claimant was employed by the Respondent on 1<sup>st</sup> July, 2013 as an Assistant Chef at Kshs.153,562/= as at the date of his resignation on 31<sup>st</sup> May, 2016 after working for the Respondent for 3 years and served diligently.
3. That unpaid dues were not paid having not proceeded on leave for 3 years as the same was denied by the Respondent and other employees took leave and worked overtime without pay.
4. That the Claimant, his counsel and the Respondent had a meeting on 8<sup>th</sup> June, 2016 to discuss unpaid dues but the meeting was acrimonious.
5. It is the Claimant's case that Mr. Russel Thuma and Elizabeth Wambua coerced him to accept the offer of Kshs.830,000/=.
6. The Claimant prays for;
  - (i) Gratuity/terminal benefits, overtime worked but not paid, pay in lieu of annual leave and sick leave.
  - (ii) Damages for discrimination.
  - (iii) Costs of this suit.



- (iv) Interest at court rates.

### **Respondent's case**

7. In its response, the Respondent admits that the Claimant was its employee effective 1<sup>st</sup> July, 2013 and had agreed to work on weekends and public holidays and extra hours in exchange for extended leave.
8. That after resignation, the Claimant wrote an email on unpaid leave days earned but unutilized which culminated in the meeting held on 8<sup>th</sup> June, 2016 and the parties agreed on a mutual separation as per the agreement dated on even date and the Claimant collected his cheque of Kshs.835,510/= on 13<sup>th</sup> June, 2016 and signed a discharge voucher and was given a certificate of service.
9. The Respondent avers that the Claimant took extended leave, up to 173 days for the entire duration he worked for the Respondent.
10. The Respondent states that the Claimant's counsel did not participate in the meeting held on 8<sup>th</sup> June, 2016 and stayed out throughout the meeting and the Claimant was not coerced to accept the alleged offer. Otherwise, he ought to have sought his counsel's intervention.
11. It is the Respondent's case that the Claimant resigned voluntarily and was paid Kshs.835,510/= as terminal dues and was a member of the National Social Security Fund.
12. That Respondent prays for dismissal of the suit with costs.

### **Claimant's evidence**

13. On cross-examination, the Claimant confirmed that he was not the only Chef in Somalia, that he had a colleague, a fact he did not acknowledge in his written statement.
14. The witness admitted that he had a written contract of employment dated 21<sup>st</sup> June, 2013 which defined his working hours.
15. That leave was 21 days per year as the minimum and the contract made no reference to payment for overtime.
16. That he accepted the terms of the contract of employment willingly.
17. Although, the Claimant testified that he did not proceed on annual leave and it was denied, on cross-examination, he confirmed that a total of 8 applications for leave for days ranging from 5 to 23 had been approved by the Respondent, a total of 149 days from 2013 to 2016.
18. Puzzlingly, the Claimant insisted that he stood by his statement and thus gave contradictory evidence.
19. The Claimant testified that the meeting on 8<sup>th</sup> June, 2016 was a cordial meeting to resolve a mutual separation and his counsel had not recorded a statement on the meeting.
20. The witness feigned ignorance of the Separation Agreement dated 8<sup>th</sup> June, 2016 but admitted that the signature on the document was his and that he was in agreement with the contents at the time and was paid Kshs.835,510.00 and neither filed a complaint nor objection or outstanding amount.
21. The witness denied counsel's suggestion that the suit was a second bite at the cherry.
22. On re-examination, the witness testified that the contract of employment provided for annual leave and working hours and he worked overtime.



### **Respondent's evidence**

23. RWI, Mr. Rusel Thuma confirmed that he was the Human Resource Manager at the time.
24. He denied awareness of any other contract of employment alleged by the Claimant.
25. The witness confirmed that the Claimant's working hours was 40 per week and did not complain about it and any extra hours worked depended on exigencies of duty.
26. RWI testified that home/vacation leave covered annual leave which amounted to 56 days and one off-day per week.
27. The witness testified that he was unaware of the extra working hours the Claimant was claiming and at no point was the issue ever brought up.
28. On re-examination, RWI testified that the one page document signed by the Claimant on 21<sup>st</sup> June, 2013 and one Erik Hermansson was not a contract or binding agreement.
29. It was his evidence that they operated a shift system and working hours seldom exceeded 40 hours a week.
30. That the Claimant was not denied leave.

### **Claimant's submissions**

31. By 22<sup>nd</sup> November, 2023 when the court retired to prepare this judgement, the Claimant had not filed submissions.

### **Respondent's submissions**

32. The only issue for determination is whether the Claimant is entitled to the reliefs prayed for.
33. On pay in lieu of leave, counsel submitted that the *Employment Act*, 2007 provided for a minimum of 21 days leave per year and the Claimant was entitled to 56 working days of leave exclusive of travel dates.
34. Counsel submitted that the Claimant could not invite the court to rewrite the contract of employment.
35. Reliance was made on the decisions in Samuel Chacha Mwita V Kenya Medical Research Institute (2014) eKLR, Pius Kimaiyo Langat V Co-operative Bank of Kenya Ltd (2017) eKLR among others to urge that the court ought to decline the invitation to rewrite the contract as the paid home vacation was sufficient and more favourable than the provisions of the *Employment Act*, 2007.
36. Counsel submitted that the Claimant's claim for discrimination lacked merit for want of supportive evidence as held in Samson Gwer & 5 others V Kenya Medical Research Institute (2020) eKLR.
37. As regards overtime, counsel submitted that the Claimant's contract of employment was clear on working hours and he agreed not to be compensated for extra hours, if any, and the Claimant did not adduce evidence of entitlement to overtime pay.
38. Reliance was made on the sentiments of the court in Onesmus Irungu KamaU V Faulu Microfinance Bank Ltd (2017) eKLR to reinforce the submission.
39. Counsel urged that the Claimant adduced no evidence of having worked extra hours.



40. As regards pay in lieu of sick leave, counsel submitted that the Claimant had not filed evidence to prove entitlement to pay in lieu of sick leave as he had not satisfied the requirement of Section 30(1) and (2) of the *Employment Act*, 2007.
41. On the Separation Agreement and Discharge Voucher, counsel submitted that the meeting on 8<sup>th</sup> June, 2016 was cordial and was not a disciplinary meeting and the Claimant's allegation that he was coerced to sign the agreement was false and the discharge voucher was binding.
42. Reliance was made on the sentiments of the court in *Max Masoud Roshankar & another V Sky Aero Ltd (2015) eKLR*, *Alfred Nzomo Kithusi V Hillcrest Investments Ltd (2021) eKLR* and *Coastal Bottlers Ltd V Kimathi Mithika (2018) eKLR* to submit that the Claimant had failed to prove that the settlement agreement and the discharge voucher were vitiated by coercion or undue influence and had not protested to the execution of either of the documents.
43. Finally, it was submitted that the claim for terminal benefits was unmerited as the Separation Agreement and the discharge voucher covered all dues and the claim for gratuity was unmerited as well as the Claimant was a member of the National Social Security Fund as held in *Jayesh M. Sutaria V Jambo Biscuits (K) Ltd (2014) eKLR* and *John Mulinge Mutuku V Kartasi Industries Ltd (2019) eKLR*.

### **Findings and determination**

44. It is common ground that the Claimant was employed by the Respondent effective 1<sup>st</sup> July, 2013 and resigned from employment vide letter dated 5<sup>th</sup> April, 2016. His last day of service was 31<sup>st</sup> May, 2016, a duration of 2 years and 11 months.
45. It is also not in contest that the Claimant's contract of employment was written containing detailed provisions on salary and benefits, working hours, paid home leave vacation and termination among others.
46. The pith and substance of the Claimant's case is terminal dues described as terminal benefits, overtime not paid, payment in lieu of annual leave and payment in lieu of sick leave.
47. The issues for determination are;
  - (i) Whether the Claimant waived his right to pursue further claims against the Respondent.
  - (ii) Whether the Claimant is entitled to the reliefs sought.
48. Before delving into the specific prayers, it is essential to dispose of the peripheral claim for damages for discrimination.
49. This prayer is grounded on paragraph 8 of the Claimant's witness statement that he was denied annual leave while other employees proceeded on annual leave. When confronted with the Leave Application Forms, he had completed, the Claimant admitted that he indeed proceeded on leave for a total of 149 days for the duration of employment of which 67 days were specific to annual leave and all applications were approved.
50. Although on re-examination, the Claimant alleged that the forms on page 17, 19 and 21 did not specify the type of leave, it was he who for unexplained reasons did not specify and did not deny having proceeded on leave for the 77 days in question.
51. In a nut shell, the Claimant's allegation that he was denied leave and did not as such take leave was controverted by the Respondent and is unsustainable and fails.



52. Closely related to the foregoing is the allegation that the other employees proceeded on leave.
53. Strangely, the Claimant's written statement makes reference to no other employee of the Respondent and he did not provide a list of names of his colleagues who proceeded on annual leave while he did not.
54. Consequently, the claim for damages for the alleged discrimination is unproven and is accordingly dismissed.
55. I will now proceed to the other prayers;

**(a) Overtime not paid**

56. Clause 3 of the Claimant's contract of employment provided for the working ours. It additionally provided that;

“However in view of your position, you may be required to work such further hours as may be necessary to discharge your duties and the employee agrees not to be compensated for work hours exceeding 40 hours per week including Saturday and Sunday.”

57. The Claimant did not contest this clause during his employment and did not lodge any claim for overtime.
58. He admitted, on re-examination he had not been promised pay for overtime, if any.
59. More significantly, apart from the meticulous computations in paragraph 20 of the Memorandum of Claim, the Claimant tendered no evidence on the number of hours he was claiming and when they accrued or any document to support the figures.
60. Neither the written statement nor the oral testimony make reference to the hours at paragraph 20 of the claim.
61. This is a claim for special damages which must not only be pleaded but specifically proved.
62. The Claimant, in the court's view has failed to discharge the burden of proof rendering the claim unsustainable.

The prayer for overtime is dismissed.

**(b) Overtime for annual leave**

63. Clause 5 of the contract of employment provided for paid home leave vacation of 2 weeks after every 3 months, a total of 56 days a year exclusive of travel time between Kenya and Somalia. The leave covered public holidays in Kenya and Somalia.
64. The contract had no other leave other than paternity for 14 days.
65. According to the Claimant, the paid home leave vacation was over and above the annual leave of 21 days a year yet the 44 working days leave was more than twice the 21 days annual leave.
66. The Claimant's written statement that he did not proceed on annual leave yet application forms he had completed and signed reveal that he had indeed proceeded on annual leave and specified as such for a total of 77 days for 2 years and 11 months sounds dishonest which implicates his credibility as a witness.
67. The witness admitted in court that all his leave applications were approved.



68. Other than the figures articulated in paragraph 20 of the claim, the Claimant led no evidence of the leave days, public holidays he worked and was not paid.
69. The finds the claim for overtime pay for annual leave and public holidays unproven as held in *Esther Nyambura Ndegwa V Laboratory & Allied Ltd (2021) eKLR*.
70. The prayer fails for want of proof.

**(c) Sick leave of 12 days**

71. The Claimant is praying for Kshs.133,531.00 as sick leave which would suggest that he had been accorded sick off by a doctor or other person due to illness or indisposition but was not paid for the days in question even after furnishing the requisite medical document or sick off sheet.
72. Neither the Claimant's written statement nor the oral testimony adduced in court make reference to any indisposition or sick off or availment of sick off sheet to the Respondent or non-payment while on sick off.
73. There is no documentary evidence to support the sick leave of 12 days.
74. The prayer lacks supportive evidence and fails.

**(d) Gratuity**

75. It is trite that gratuity is an amount paid by an employer gratuitously in appreciation of an employee's service and is typically contractual or part of the Collective Bargaining Agreement between the employer and a trade union.
76. The Claimant's employment contract has no provision for gratuity neither was he a member of a trade union.
77. The claim for gratuity is misplaced and fails for want of proof.
78. It is however important to mention that gratuity and service pay are not synonymous. Service pay is provided for by Section 35(5) of the *Employment Act, 2007* and is payable where the provisions of Section 35(6) of the Act do not apply.
79. On the other hand, gratuity is a contractual imperative.
80. In sum, it is the finding of the court that the Claimant's claim for gratuity/terminal benefit, overtime, pay in lieu of leave and sick leave is not supported by any tangible material and is thus unsustainable and fails.
81. As to whether the Claimant waived his right to pursue further claims against the Respondent, it is common ground that the Claimant signed a Separation Agreement on 8<sup>th</sup> June, 2016 and a discharge letter on 13<sup>th</sup> June, 2016 when he received a cheque of Kshs.835,510.00 from the Respondent.
82. The settlement agreements and discharge letters or vouchers have been considered in various decisions of the Court of Appeal such as *Kyrstalline Salt Ltd V Kwekwe Mwakele & 67 others (2017)* where the court stated that the law governing employment in Kenya is the general law of contract grounded on the common law as codified in the *Employment Act, 2007* and other statutes.



83. The court stated in part;
- “In that sense, employment is seen as an individual relationship negotiated between employee and the employer according to their needs.”
84. Needless to belabour, the settlement agreement between the Claimant and the Respondent dated 8<sup>th</sup> June, 2016 executed by the parties on even date was a legally enforceable contract unless it is demonstrated that it was vitiated by duress as the Claimant alleges in his Memorandum of Claim and his written statement, undue influence, misrepresentation or other vitiating element.
85. In his statement, the Claimant testified that the meeting on 8<sup>th</sup> June, 2016 became acrimonious and his advocate was requested to leave after which Russel Thuma and Elizabeth Wambua coerced and unduly influenced him to accept the offer of Kshs.835,510.00 as terminal dues.
86. On cross-examination, the Claimant confirmed that the meeting was attended by 4 persons including the Claimant and his counsel and he had not notified the Respondent of the meeting.
87. The witness was emphatic that it was a cordial meeting to agree on a mutual separation and the Respondent was entitled to deny his counsel audience for want of notice.
88. Puzzlingly, the witness still testified that he was coerced and unduly influenced but did not recall the agreement yet he collected the cheque on 13<sup>th</sup> June, 2016, 5 days after signing the agreement. He was categorical that he was in agreement with the terms of the agreement and received the cash without complaint or objection.
89. One of the clauses of the Separation Agreement provided that;
- “Notwithstanding any unprocessed expense, claims or any payment that you are entitled to but not due yet, you and the company acknowledge and agree that the sums made pursuant to this Agreement satisfy any entitlements or claims that you may have to salary, bonus, allowance, all other benefits and compensation, leaves, severance or terminal payments and all and any other legal and statutory entitlement arising from service with the company, whether arising under the law of Kenya or any other countries.”
90. The foregoing is a waiver clause.
91. By signing the Separation Agreement, the Claimant waived his rights to pursue other entitlements or claims he may have had against the Respondent.
92. The claimant’s contradictory evidence that he was in agreement with the terms, was paid and received the cash but signed the agreement under duress reveal that he was seeking a way out of the deal after the fact, an undertaking he did not embark on immediately yet his counsel was outside and went for the cheque 5 days later after being “forced” to sign the contract.
93. In *Thomas De La Rue (K) Ltd V David Opondo Omutelema (2013)* eKLR, the Court of Appeal stated as follows;
- “We agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligations and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has in each and every case to make a determination, if the issue is raised, whether the discharge



voucher was freely and willingly executed, when the employee was seized of all the relevant information and knowledge.”

94. At common law, duress consists of actual or threatened violence or imprisonment and its subject must be either the contracting party, wife, parent or child and must be inflicted or threatened by the other party to the contract.
95. It destroys a person’s free agency to enter into a contractual relationship.
96. The Claimant tendered no evidence of actual violence inflicted on him or threats by either Rossel Thuma or the alleged Elizabeth Wambua.
97. It is the finding of the court that the claim for duress or undue influence remains unproven.
98. In sum, it is the finding of the court that the Separation Agreement between the Claimant and the Respondent was a legally enforceable agreement binding on the parties. (See *Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. Ltd* (2015) eKLR.)
99. After the Claimant executed the Separation Agreement on 8<sup>th</sup> June, 2016, he executed a discharge letter on 13<sup>th</sup> June, 2016 by which he agreed that there was no other amount owed to him as an employee of the company and as at 13<sup>th</sup> June, 2016, he was estopped from alleging that he had outstanding claims against the Respondent as held in *Katiwa Kanguli V Bamburi Cement Co. Ltd* (2015) eKLR where the appellant had signed a document entitled *Acceptance of Transfer of gratuity for period served as a unionisable employee* and the appellant received Kshs.2,772,722/= and subsequently signed a discharge voucher that he received sum “was in full and final settlement and discharge of all sums due to me and acknowledge that I have no further claims against the company including claims for reinstatement.”
100. According to the court in *Katiwa Kanguli V Bamburi Cement Co. Ltd* (Supra);

“This constituted an unequivocal representation by the appellant that all his dues had been settled. Short of proving that this representation was secured through fraud, duress, mistake, undue influence or misrepresentation, the appellant cannot be allowed to disown it . . .

It is in situations such as these that the doctrine of promissory estoppel applies. Estoppel is a set of doctrines in which a court prevents a litigant from taking an action that the litigant normally would have the right to take in order to prevent an inequitable result . . .

By signing the discharge voucher on the terms aforesaid, the appellant in essence gave an undertaking not to lodge a claim for any further gratuity dues. Unless he could show that the undertaking was vitiated by . . .”
101. Denning L. J. expressed similar sentiments in *Combe V Combe* (1951) 2 K.B 215.
102. Having signed the Separation Agreement dated 8<sup>th</sup> June, 2016 and the discharge letter dated 13<sup>th</sup> June, 2016 and having further failed to demonstrate that the signatures on either of the documents was procured by duress, mistake or undue influence, the Claimant was bound by the two documents as his promise or undertaking.
103. In the upshot, the Claimant’s suit against the Respondent ought not to have been instituted as it is unsustainable and it is accordingly dismissed.
104. In the circumstances, it is only fair that each party bears own costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> 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 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 *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**

