Makomo v National Council, Young Men Christian Association, Kenya (Cause 1813 of 2016) [2022] KEELRC 1627 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1627 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1813 OF 2016

SC RUTTO, J

MAY 27, 2022

BETWEEN

DANIEL MAKOMO ..... CLAIMANT

AND

NATIONAL COUNCIL, YOUNG MEN CHRISTIAN ASSOCIATION, KENYA ..... RESPONDENT

JUDGMENT

1. The undisputed facts of this case are as follows; the claimant was employed by the respondent as a gym instructor and was on a fixed term contract, which was renewed periodically. That the claimant served his last contract upto the month of June, 2016 and thereafter, the employment relationship ended as his contract was not renewed. Beyond these, each side has its own version of facts.

2. The claimant has averred that the respondent withheld his salary for the month of June, 2016. That further, he was served with a letter requiring him to settle sums of money allegedly lost due to unpaid members using the respondent's training facilities. He further claims that he worked overtime and doubled up as a gym manager but was not remunerated accordingly. Consequently, he seeks against the respondent payment of his salary for the month of June, 2016, payment for the period he acted as a gym manager, overtime pay, unpaid leave days, an account of remittances to the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF), certificate of service and costs of the suit.

3. The claim has not gone unchallenged. The respondent avers that the claimant was negligent, dishonest and professionally irresponsible thus leading it to incur a significant loss of Kshs 426,300/=. That it was a result thereof, that his contract which had ended in June, 2016, was not renewed. The respondent further denies the claimant's assertions that he worked as a gym manager. The respondent avers that the claimant is not entitled to any of the reliefs sought hence asks the Court to strike out or dismiss the suit with costs.

4. The matter proceeded for part hearing on October 28, 2021 when the claimant presented and closed his case. The matter was then adjourned for defense hearing on January 24, 2022, whereafter trial closed.

Claimant's case

5. At the outset, the claimant adopted his witness testament and bundle of documents filed together with his claim, to constitute part of his evidence in chief. The documents were also produced as exhibits before Court. The claimant denied the averments contained in the response. Specifically, he denied occasioning loss of the respondent's funds as the cash office was responsible for receiving all payments.

6. It was the claimant's further testimony that he used to work from 5 am to 9 pm, as he was the only gym instructor at the time, and he did not have a replacement. He further stated that the gym was operational every day of the week except for Sundays. That as such, he would work for 7 hours overtime every day for all the days worked, but he was not adequately compensated. He further told court in testimony, that he doubled up as the gym instructor and the gym manager for 11 months from April to December, 2013 and two months in 2014 as the regular gym manager was away. That as such, the respondent had promised to pay him Kshs 5000/= every month over and above his salary, but this promise was not honoured.

7. The claimant further stated that he did not proceed on leave towards the end of his working days. He further contended that the respondent deducted sums of money from his salary ostensibly for NHIF and NSSF but failed to remit the same. In summing up his testimony, he asked the Court to allow his claim as prayed.

8. Upon cross examination, the claimant stated that he was verbally instructed to act as the gym manager.

Respondent's case

9. The respondent presented oral evidence through Mr Joel Shikanga Obaye, who testified as RW1. He also adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute part of his evidence in chief. He also produced the said documents as exhibits before court.

10. Mr Shikanga identified himself as the Finance Manager of the respondent. He told Court that the respondent lost the sum of Kshs 426,300/= as a result of the claimant's negligence. That an audit was carried out and the claimant was given an opportunity to be heard but he opted to stay mute. That the claimant's contract was due to expire at the end of June, 2016, but the same was not renewed on account of the negligence on his part. It was Mr Shikanga's further testimony that at the time of filing the response, the respondent had paid the claimant's salary for the month of June, 2016. That further, the respondent had remitted all the statutory deductions as required under law. He further disputed the claimant's assertions that he worked as a gym manager.

Submissions

11. It was submitted on behalf of the claimant that pursuant to section 112 of the *Evidence Act*, the respondent had the burden to demonstrate that it paid him salary for the month of June, 2016. That further, pursuant to section 10(7) of the *Employment Act*, the respondent had the burden of proving that the claimant did not act as a gym manager. It was further submitted that the respondent did not dispute that the claimant worked overtime. Reliance was placed on Order 2 Rule 4(1) of the *Civil Procedure Rule*s, *Regulation of Wages & Conditions of Employment Act* as well as the case of Captain Harry Gandy vs Caspar Air Charters Ltd, Civil Appeal No 7 of 1995.

12. On its part, the respondent submitted that the claimant was required to prove that he had not been paid his salary for the month of June, 2016. That further, the claimant had not proved by way of evidence, that he acted as the gym manager for 11 months. To support this submission, the respondent cited the case of *Patrick Peter Kithini vs Justus Mwongela* (2020) eKLR. It was the respondent's further submission that it had discharged its burden under section 10(7) of the *Employment Act*, by proving that the claimant was only employed to act as the gym instructor. The respondent further submitted that the claimant was bound by his contract of employment which provided that he could be required to work extra hours. To buttress this submission, the respondent asked the Court to consider the determination in the cases of *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & another* (2001) KLR and *Thomas Kobe and 114 others vs Kenya Ports Authority* (2011) eKLR. It was further submitted that since the claimant had only been employed for two months, he was not entitled to any leave days. That further, the respondent had produced evidence to prove that it had duly remitted the statutory deductions in favour of the claimant.

Analysis and determination

13. Flowing from the pleadings on record as well as the evidence placed before me, the sole issue falling for the Court's determination is whether the claimant is entitled to the reliefs sought.

Salary for the month of June, 2016

14. The respondent stated in its response that it duly paid the claimant's salary for the month of June, 2016. However, it is notable that the respondent did not produce any evidence to back up this assertion. It actually beats logic why it would produce bundles of payment vouchers in respect of other months relating to previous contracts and specifically leave out the payment voucher for the month of June, 2016, which is in issue.

15. Indeed, the payments for the past months are uncontested hence irrelevant in this case. What was more relevant was the payment voucher for the month of June, 2016 and no other month. Having been sued specifically, for the nonpayment of salary for June, 2016, it was only reasonable and prudent that the respondent produces evidence that could assist it in its case. Why did it not do so? If the respondent indeed paid the claimant's salary for the month of June, 2016, then nothing would have been as easy as producing the relevant payment vouchers as it has done for the other months.

16. Over and above, it is notable from the respondent's letter dated July 6, 2016, that the claimant's dues were being withheld pending payment from his end, of Kshs 86,200/=. The letter reads in part: -

> " Following the non-renewal of your contract and the earlier communication regarding non payment of Kshs 86,200 (Kenya shillings eighty six thousand, two hundred only) which clients never paid while using the gym under your watch, you need to organize and pay the cash within 7 days so that the office can organize to clear you and pay you any dues you are owed by the YMCA." Underlined for Emphasis

17. This lends credence to the claimant's assertions, that his salary was withheld as he was required to pay the money demanded by the respondent.

18. As such, the Court the Court is led to draw an adverse inference and is persuaded that the respondent did not pay the claimant's salary for the month of June, 2016 and the same is due.

Acting allowance as Gym Manager

19. The claimant has prayed for the sum of Kshs 55,000/= being payment for 11 months during which period he alleges to have acted as the gym manager. The respondent disputed the claimant's assertions that he worked as a gym manager. It relied on the claimant's contract of employment which designated him as a gym instructor. Besides, his assertion, the claimant did not produce evidence to back up this assertion. It is also noteworthy that during cross examination, he stated that the acting arrangement was verbal.

20. That aside, I note that the period for which the allowance is being claimed for, is in respect of intervals between 2013 and 2014. It is also notable that the said amount constitutes a continuing injury. Accordingly, pursuant to section 90 of the *Employment Act*, the amount ought to have been claimed within 12 months after the cessation of the injury. In this case, the claim is time barred as 12 months had long lapsed from the time that specific contract terminated.

21. In the circumstances, the relief is declined.

Overtime

22. The claimant has prayed for overtime pay in the sum of Kshs 1,234,506/=. In disputing the claim, the respondent has relied on the claimant's contract of employment which provided that he could be called upon to work extra hours.

23. The claimant's last contract of employment which is dated April 27, 2016, provides as follows under clause 6;

> " Hours of work
>
> It is not possible for the Association to lay down the exact number of hours that you be called upon to perform in one week. You will however be expected to do at least 48 hours per week, but in certain cases you will be called to undertake special assignments which may require you to work for more than 48 hours a week."

24. It is therefore apparent that the respondent is not disputing the claimant's assertion that he worked beyond the stipulated period but that the same was within his employment contract.

25. Pursuant to Regulation 5(1) of the *Regulation of Wages (General Order), 1982*, an ordinary work schedule is 52 hours over a period of six days. This is approximately 8 hours per day. Accordingly, any time served over and above such time, amounts to overtime and payment is due at the stipulated rate under the said Wage Order.

26. It therefore follows that clause 6 of the claimant's contract of employment was not in compliance with the law hence unenforceable. It is therefore improper for the respondent to submit that the claimant is bound by the contract when the clause being referred to, is contrary to the law.

27. Further the respondent's assertion that the overtime pay was factored in his salary is unsubstantiated as it was not backed by any evidence. In any event, if it were so, then the same would have been spelt out under the claimant's contract of employment.

28. Notwithstanding the foregoing, the claimant has not particularized his claim and specified the period under which he seeks compensation for the overtime worked. Besides claiming to have worked for 7 hours overtime per day, the period under which the sum is payable has not been specified. This is

moreso given that the claimant worked under different contracts which lasted for diverse periods and which was not subject to a uniform salary.

29. It was therefore incumbent upon him to assist the Court by being more specific in his claim. In absence of such particulars and this being a specific claim, the Court is at a loss as to where to start and end in assessing the same. The Court will not grope in the dark.

30. In arriving at this determination, I am further guided by the decision in *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR where the Court expressed itself as follows;

> " It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at..."

31. In the circumstances, the prayer for overtime cannot be sustained.

Unremitted statutory deductions

32. The claim for NHIF and NSSF deductions is also declined as the respondent was able to prove by way of documentary evidence that it duly made the remittances on account of the claimant.

Unpaid leave days

33. The claimant has sought payment of unpaid leave days being Kshs 12,350/=. The respondent disputed this claim on the basis that the claimant had only worked for 2 months. With all due respect, this argument does not hold and the claimant was still entitled to leave days on a prorated basis. Notably, the claimant's last contract did not provide for leave. In absence thereof, the provisions of section 28(1) of the *Employment Act* apply.

34. Under the said section 28(1), the minimum annual leave entitlement to an employee is 21 days. Given that the claimant's contract of employment was for a period of 2 months, when prorated, the same comes to 3.5 days.

Certificate of service

35. As the employment relationship is not in dispute, the claimant is entitled to a Certificate of Service pursuant to section 51(2) of the *Employment Act*.

Orders

36. In the final analysis, I allow the claim against the respondent to the extent that the claimant is entitled to the salary for the month of June, 2016 and payment for 3.5 unpaid leave days. The total sum of the unpaid salary (Kshs 24,717/=) plus unpaid leave days (Kshs 2,883.65) is Kshs 27,600.65. This figure shall be subject to interest at court rates from the date of filing the suit.

37. There will be order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of May, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr Khayega

For the Respondent Mr Aloo

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

****JUDGE**