



**Mwathi v Collection Agency Limited (Cause 2441 of 2017)
[2022] KEELRC 1298 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1298 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2441 OF 2017
NZIOKI WA MAKAU, J
JULY 13, 2022**

BETWEEN

ANNE WANGECHI MWATHI CLAIMANT

AND

COLLECTION AGENCY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 11th December 2017 which she amended on 1st February 2021. She claims against the Respondent for failure to pay her House Allowance as well as the full and final dues owed to her and for failure to remit statutory deductions and to issue her a certificate of service. She avers that the Respondent employed her from 5th September 2015 as Legal Officer or In-house Counsel or Litigation Associate on a monthly salary of Kshs. 51,268/- but was never offered an employment contract for the two years that she worked for it and despite persistently requesting for the same. It is the Claimant's averment that she tendered her resignation on or about August 2017 and gave the Respondent requisite notice as prescribed by Statute. That however upon checking her compliance status with the government agencies, she realised that the Respondent never remitted the statutory payments for *PAYE*, *NSSF* and *NHIF* that it deducted from her income for the period that she worked for it. That even though she worked five days a week and 4 hours overtime during alternate weekends throughout her employment period with the Respondent, she has never been paid overtime despite demand for the same. She avers that the Respondent also failed to pay and remit all the unpaid leave days she had not taken or even receive compensation in lieu of the untaken leave days. She avers that failure of the Respondent to remit the statutory dues has made it impossible for her to access essential and crucial government services which she urgently requires and that the actions of the Respondent are unlawful, wrongful, unfair and inhumane. The Claimant avers that the lack of a certificate of service has reduced her chances of getting employment elsewhere.



2. The Claimant thus prays that this Honourable Court award her compensation as calculated in her Amended Memorandum of Claim; a refund and/or compensation for unpaid statutory deductions also as calculated in the amended Claim; interest on the forgoing compensation at the rate of 14% per annum from the date of termination of service until payment in full; and any other relief as the Court may deem just and fit to grant.
3. The Respondent filed a Reply to the Memorandum of Claim dated 20th February 2018 admitting to have employed the Claimant and averring that it issued her with a letter and a copy of the contract. That it also made all necessary payments to her as agreed in her Contract and abided by the terms of the contract as well as all the requisite employment laws. The Respondent further avers that the Claimant's demands are not within the statutory requirements as they are unreal and that there was no agreement between parties for the said payments. That this Court should disregard the submissions set forth in the Claim as they lack factual or legal foundation and that the Claim should be dismissed with costs.
4. In response, the Claimant filed a Reply to the Respondent on 4th February 2021 reiterating the averments made in her Amended Memorandum of Claim and asked that judgment be entered.
5. The Claimant testified and the Respondent did not attend the hearing or offer any oral testimony. She stated that she is currently employed at the department of Justice and that she was formerly employed by the Respondent from whom she resigned. She stated that there was no counter by the Respondent to her testimony.

Claimant's Submissions

6. The Claimant submits that Section 31 of the *Employment Act* provides that an employer shall provide reasonable housing accommodation for each of his employees or pay the employees such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. That however since the Respondent herein never paid and or provided her with housing allowance, she is entitled to the same as dictated by section 31. She submits that in *Milkab Khakayi Kulati v Sandstorm (Africa) Limited* [2014] eKLR, the court held that the claimant's salary was not inclusive of house allowance after finding that there was no expressed intention on the same. She submits that Section 31(2) of *the Act* indeed only applies where there is a contract and which contract has an express provision indicating that the salary paid is a consolidated salary. The Claimant further submits that the Court of Appeal in considering the issue of house allowance in the case of *Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu* [2019] eKLR, quoted with approval the findings in the case of *Ananna Yonemura v Liwa Kenya Trust* [2014] eKLR and the case of *KUDHEIHA Workers v B.O.G Maseno School For The Deaf* [2013] eKLR where the Court held 15% as reasonable percentage that an employee spends from part of a salary to pay house rent. It is the Claimant's submission that she is therefore entitled to Housing allowance.
7. The Claimant submits that the issue of annual leave is well covered under Section 28 of the *Employment Act* to the effect that an employee is entitled to not less than twenty-one working days of leave with full pay after every twelve consecutive months of service with his employer. The Claimant submits that she testified that out of the 42 (forty-two) leave days that she was entitled to, she only took 8 (eight) days and was left with a balance of 34 (thirty-four) days which she ought to have been compensated in lieu thereof. That this testimony was not controverted and or challenged in any way shape or form. She submits that in the case of *Fancy Jeruto Cherop & Another v Hotel Cathay Limited* [2018] eKLR, the Court held that the employer has the duty to ensure every employee has taken annual leave as and when due and that the defence that the claimants failed to taken annual leave and thus forfeited the same is not a position supported in law, as held in the case of *Rajab Barasa & 4 Others v*



Kenya Meat Commission [2016] eKLR. As regards service pay, the Claimant cites the case of *Martin Ireri Ndwiga v Olerai Management Company* [2017] eKLR where the court pronounced itself that service pay is dues to an employee who has not enjoyed the benefit of statutory deductions and is thus covered under Section 35(5) and (6) of the *Employment Act, 2007*. She submits that she produced a Statement from the NSSF issued on 13th September 2017 which shows that no remittances were made by the Respondent. That it is therefore proper to submit that she is entitled to the claim for Service pay. It is the Claimant's submission that she also testified that indeed the Respondent deducted but failed to remit her statutory dues and that her Pay slips tendered into evidence are concrete proof of that fact. That as a matter of fact, the Respondent deducted PAYE from her salary knowing very well that being a person living with disability, she was exempted from paying PAYE as shown in the exemption annexed to her Supplementary List of documents dated 21st July 2021. Equally, the Respondent deducted but failed to remit the deductions it made for N.H.I.F which deductions ought to be refunded to her. The Claimant submits that to the victor belongs the spoils and as such, she ought to be awarded costs of the Claim together with interest on the above sum from the date of termination of employment until payment in full.

8. The Respondent did not file any Written Submissions.
9. The Claimant was from the evidence adduced a person living with disability and the deducted PAYE was unlawfully taken from her. As the Respondent was aware of her special status, the sum deducted would have to be refunded to her. It is also an offence to make deductions that are not accordingly remitted to Government agencies such as tax (PAYE). The Claimant's pay was required to include house allowance and having failed to prove there was any paid the Claimant would be entitled to 15% of her salary as house allowance. She failed to prove her entitlement to overtime pay. No time sheets or letters claiming the sum prior to the institution of the suit were availed. On overtime, the burden rests on the employee to show that she sought payment for the alleged overtime and it bodes ill for an employee not to seek her dues during the pendency of the contract and only come to court at the last minute to claim such. This is because unlike salary, overtime is fluid and changes depending on the hours and days worked. This head of the claim being unproved is disallowed. In the final analysis I enter judgment for the Claimant against the Respondent for:-
 - i. Kshs. 51,268/- being service pay for the 2 years worked.
 - ii. Kshs. 92,282.40 being house allowance for one year.
 - iii. Kshs. 67,042.77 being leave dues.
 - iv. Kshs. 280,296/- being unremitted dues.
 - v. Interest on the sums in (i), (ii) and (iii) above at Court rates from date of judgment till payment in full.
 - vi. Interest on the sum in (iv) above at commercial rates from date of filing suit till payment in full.
 - vii. Certificate of service in terms of Section 51 of the *Employment Act*.
 - viii. Costs of the suit.
10. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2022

Nzioki wa Makau

JUDGE

