



**Mburugu v Radio Africa Limited (Cause 890 of 2015)
[2022] KEELRC 3886 (KLR) (2 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3886 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 890 OF 2015
SC RUTTO, J
SEPTEMBER 2, 2022**

BETWEEN

VERA NKIROTE MBURUGU CLAIMANT

AND

RADIO AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent pursuant to a contract of employment dated November 1, 2010 as a sales and marketing executive. She tendered her resignation vide a letter dated November 12, 2014. Her proposed last day of work was to be December 18, 2014. The respondent accepted the resignation with regret and informed her of the contractual requirement to pay an equivalent of two months salary in lieu of notice. Subsequently, the claimant opted to serve the notice period of two months hence she worked upto January 12, 2015. Thereafter, the dispute began.
2. The claimant avers that the respondent unlawfully and without justification, deducted the sum of Kshs 232,000/= from her salary and refused to process her dues. It is for this reason that the claimant seeks against the respondent the sum of Kshs 970,094.47 being accrued leave days, unpaid house allowance and unlawfully deducted salary.
3. In its defence, the respondent avers that upon the claimant serving her notice period, she was paid the sum of Kshs 42,244.00 being her terminal dues. The respondent further denied unlawfully effecting the deduction in the sum of Kshs 232,000.00 from the claimant's salary. Consequently, the respondent has asked the Court to dismiss the claim with costs.
4. The matter proceeded for hearing of the claimant's case on October 18, 2021 and subsequently on March 15, 2022, when the defence side presented and closed its case.



Claimant's Case

5. At the outset, the claimant adopted her bundle of documents to constitute her evidence in chief. She also produced the said documents as her exhibits before Court. The claimant explained to the Court the process of running an advertisement. In this regard she stated that a sales executive would sign the order which the client would approve. That a copy of the order would then be signed off by the credit control as well as the head of finance. That about four or five signatures would be required before the advertisement goes on air. That in fact, she could not claim a commission before the advertisement order is paid for. That even if a postdated cheque is issued, then payment would not be made. That it is the respondent's credit control office that would also ensure that the order is paid for. That in the case herein, the client had already issued a cheque in the name of the respondent.
6. The claimant further testified that after her resignation, she served for two months until January, 2015. That thereafter, she was paid Kshs 42,000/= which was money owing to her for the days worked in January, 2015. That she only signed off the payment of the dues as full and final settlement, as she was informed that her payment would go through and that all her other outstanding dues would be paid. That the Kshs 42,000/= was not full and final. She further testified that she was not allowed to take her leave days during her employment with the respondent. That there was also no provision for house allowance and her salary was not consolidated as per her contract of employment. That the word "consolidated" never appeared in her pay slip and does not contain the item "house allowance".

Respondent's Case

7. The respondent called oral evidence through two witnesses Ms Jemima Ngode and Ms Roselilian Mburunga who testified as RW1 and RW2 respectively.
8. At the start of the hearing, RW1 who identified herself as the Human Resource Business Process Manager, adopted her witness statement dated January 30, 2020, to constitute her evidence in chief. She further produced the respondent's bundle of documents and supplementary documents, to constitute her evidence in chief.
9. It was RW1's testimony as per her witness statement, that the claimant was paid a consolidated salary which was inclusive of house allowance. To this end, she made reference to the respondent's human resource manual. That the claimant's claim for house allowance is an afterthought. She further stated that the claimant's contract of employment did not provide for carrying forward of any unused leave days to a subsequent calendar year without the consent of the Board or the Managing Director. That the claimant applied for and was granted leave and at no point was she ever denied leave by the respondent. That the claimant never applied to the Managing Director for the carrying over of her leave days hence any outstanding leave days were effectively forfeited by the claimant.
10. RW1 further testified that upon her resignation, the claimant offered to serve for two more months since her contract of employment required her to issue two months' notice before resignation. That as such, she served until January 12, 2015. That the claimant was issued with a certificate of service on June 10, 2015. She thus concluded that the claim had no basis and should be dismissed with costs.
11. RW2, Roselilian Mburunga, introduced herself as the respondent's Credit Controller. She also adopted her witness statement dated April 20, 2018 to constitute her evidence in chief. She further sought to rely on the documents filed on behalf of the respondent, to constitute her evidence in chief.



12. It was the testimony of RW2 as per her witness statement that the respondent's sales policy was on a cash basis. That credit sales were restrictively allowed upon fulfilling certain criteria in particular: -
 - i. Credit sales had to be authorized by the management of the respondent in writing before they could be granted.
 - ii. Credit sales would only be considered where the client had a three (3) year track record with the respondent.
 - iii. Postdated cheques in settlement of advertisement costs were not accepted except with the express written approval of the Group Financial Controller.
13. It was her further testimony that in the event of a credit sale, it was permissible for the respondent's sales representatives to be paid in advance on the commissions that would be due once an advertisement sale was paid for by a client. That it was the duty of the sales representative to ensure that the client settles the amount owing and in the event the client failed to make good the payment, the commissions earned in advance by the sales representative would be recovered from the sales representative.
14. That in this case, the claimant had made a credit sale with the organizers of Nairobi Kitchen Festival 2014 in respect of advertisements aired to promote the festival in the sum of Kshs 306,000/=. That in making the credit sale, the claimant did not comply with the respondent's policy by accepting a postdated cheque. That she admitted as much in her email dated November 25, 2014 to the organizers of the Nairobi Kitchen Festival.
15. That the claimant had been paid an advance commission of Kshs 237,700/= in respect of a credit sale in respect of advertisements aired to promote the festival. That since the claimant tendered her resignation on November 12, 2014, she was informed to collect all outstanding payments from clients and for which she had already been paid commissions by November 25, 2014. That thereafter, the claimant failed to collect the payments for the advertisements ran by the respondent from the organizers of the Nairobi Kitchen. That this prompted the respondent to recover the advance commissions and sales bonus issued to the claimant in the sum of Kshs 237,700/= from her terminal dues.
16. That after the claimant served her notice period, the respondent computed and paid her terminal dues being Kshs 42,244/=. That through a Dues Declaration Form dated March 9, 2015, the claimant acknowledged receipt of her final dues. That the claimant further irrevocably discharged and released the respondent, its directors, the management and staff from further liability owed to her for any obligation whatsoever.

Submissions

17. As regards the claim for leave days not taken, the claimant placed reliance on the cases of *Joaqim Mbithi vs Transocenaic Projects & Development K Limited* (2017) eKLR and *Rumba Nguta vs southern Hills Development Agency t/a Radio Kaya* (2020) eKLR, where it was held that section 28 of the *Employment Act* does not sanction forfeiture of unutilized leave. Reliance was further placed on the case of *Fancy Jeruto Cherop & another vs Hotel Cathay Limited* (2018) eKLR, where the Court found that it was the duty of the employer to ensure that every employee had taken annual leave as and when due.
18. With respect to the deductions from her salary, the claimant cited the case of *Hudson Kidaha Kisigwa vs Romageco Kenya Limited* (2018) eKLR, where it was held that the company policy must adequately address bad debts and not resort to unlawful deductions of employee salaries where a few cheques bounced. She further submitted that she signed the discharge voucher so that she could get paid hence



there was an element of undue pressure owing to financial constraints. To fortify her argument, she cited the authorities of *Solomon Weche Makhotsa vs Imara Steel Mills Limited* (2016) eKLR and *Thomas De La Rue (K) Ltd vs David Opondo Omutelema* (2013) eKLR,

19. On the other hand, the respondent submitted that clause 4 and 14 as read with the Employee Handbook provided for the salary and allowances payable to the claimant. That clause 41.1 of the contract provided that the claimant's gross pay was Kshs 35,000/= and as at December, 2014, was Kshs 78,750.00 (plus any commissions earned). In support of its position, the respondent invited the Court to consider the determination in the case of *Stephen O Edewa vs Lavington Security Limited* (2019) eKLR and *Grain Pro Kenya Inc. Ltd vs Andrew Waitbaka Kiragu* (2019) eKLR.
20. It was further submitted on behalf of the respondent that the claimant did not prove that she applied for and was denied leave. That at the time of her exit, her terminal dues included payment of leave days hence the claim for unpaid leave is unmerited. That further, the deduction made from the claimant's terminal dues was lawful and proper. That the claimant was prohibited from granting credit sales to any customer unless approved by the Chief Executive Officer and in the event she failed to comply, any bad debt could be deducted from her salary. That the claimant did not tender any evidence that the payment was made or that the sale had been approved and authorized by the respondent. In further submission, the respondent urged that the claimant did not tender any evidence invalidating the discharge voucher and that there was no duress, coercion, undue influence or fraud and none was pleaded.
21. The respondent further submitted without prejudice, that the claimant can only recover if at all, claims for alleged unpaid house allowance made within three years from June, 2012 to her last working day being January 12, 2015. That as regards the leave pay, the claimant can only recover for the 18 months (July 2013 to January 2015) preceding her resignation.

Analysis and Determination

22. Flowing from the facts herein, the evidence on record, submissions and authorities cited by the parties, the following issues stand out for the Court's determination: -
 - i. Whether the claimant is entitled to the deductions in the sum of Kshs 232,000/= made from her salary
 - ii. Whether the claimant is entitled to payment of house allowance
 - iii. Is the claimant entitled to any accrued and outstanding leave days?

Whether the claimant is entitled to the deductions in the sum of Kshs 232,000/= made from her salary

23. The claimant has alleged that the respondent unlawfully deducted the sum of Kshs 232,000/= from her dues. From the evidence presented by both sides, it is evident that the same arose from a sale made in the form of an advertisement in respect of Nairobi Kitchen Festival 2015, secured by the claimant. It would seem that the client concerned did not make the full payment thus the deduction from the claimant's salary.
24. According to the respondent, the claimant failed to collect the payments from the client. The respondent further contends that the claimant had been informed to collect the payments in respect of all prospective advertisements for which she had already been paid commission.



25. The claimant on the other hand stated that the credit sale had been approved by the respondent's credit control department since no advertisement goes on air without prior approval from the accounts department. She averred that no advance commission was ever paid to her and that she continued making up follow up payments in respect of Nairobi Kitchen Festival 2015 until the client no longer wanted to deal with her as she was no longer an employee of the respondent.

26. The respondent's credit policy as per an email emanating from Patrick Quarcoo reads in part: -

“Subject: Credit policy

Dear all,

Please note that as a result of longer and longer credit periods being granted by yourselves to various clients and our increased exposure to bad debts, I am now reverting to the long standing policy for all direct sales.

Direct sales

1. Do not grant any credit unless I have signed that credit off in writing.
2. No credit will be considered unless a client has a 3 years track record with us.
3. Even then we will consider credit for only companies with a clear credit ratings bureau certification and with pds issued for clearance within the time of the promotion or advertising campaign.
4. Recoveries must be implemented forthwith for all debts from non complaint (sic) executives as per the standard sales and collection policy-account (Paul Kiranga) to implement from Monday.

As you aware (sic) if we dont't collect, CAN'T COLLECT, it is not a sale. We are also presently pre paying 16% of every sales you make to the government in VAT even before a client has paid us....”

27. From the testimony of the claimant during cross examination, the client paid for the advertisement through three cheques, two of which were post-dated while one was current. That the two post-dated cheques were in the sum of Kshs 232,000/=. That the client later cancelled the cheques on grounds that the advertisement did not run.

28. Despite the respondent's assertion that the deduction from the claimant's salary was in respect of an advance commission paid to her, there was no evidence from its end to prove as much. It would thus seem that the deduction was in respect of the post-dated cheques totalling the sum of Kshs 232,000/= that were allegedly cancelled by the client in question.

29. The respondent contended that the claimant was well aware of its credit policy. Several questions arise in this regard. First, was the advertisement aired at all and if so, why did the same go on air when the respondent's credit policy had not been complied with? Second, how did the advertisement go on air without the same being counterchecked all the way to the credit control office and head of finance?

30. Indeed, as per the email of May 14, 2014, emanating from Martin Khafafa, no promotion was to be made without a signed contract, order and payment. It is also instructive that post-dated cheques were not acceptable. The email, is as follows: -

“Dear all,



May I reemphasize the following procedures that seem to be slipping up.

1. No promotion should get unless there is a signed contract and order. For direct sales there must be a signed CONTRACT AND ORDER + PAYMENT. In the case of the agency a CONTRACT and AGNECY LO will do. I have to clear any exceptions. Anything out of this will be in breach.
 2.
 3. Post-dated cheques are no longer acceptable. Any exception is an arrangement between you and the Group Finance controller...”
31. Coupled with the above, Patrick Quarcoo stated in his email of January 24, 2013 reproduced herein that, “...as you aware if we don’t collect, can;t collect, it is not a sale...fianlly please do note, do not grantr credit, get clients to pay upfront.”
32. Notably, the email was copied to Martin Khafafa and later cascaded by Paul Kiranga to RW2.
33. Indeed, as per the testimony of RW2, the client in question was not a blue-chip client as to be advanced credit.
34. With all these glaring issues, one then wonders how the advertisement in question was allowed to air as to amount to a sale hence deducted from the claimant’s salary?
35. Further, the claimant stated in her testimony before Court that for an advertisement to go on air, an order had to go through four or five persons who would sign for the same, with the final approval being granted by the head of finance. Among the people, the order had to go through was the credit controller, RW2.
36. How then did the entire blame fall on the shoulders of the claimant as to warrant the deduction from her salary? From the way I see it, the claimant had no mandate to determine what went on air, she merely fronted a client and collected the payments. There was another chain of signatories and approvers who would determine whether an advertisement had passed the criteria to go on air. As such, the respondent also takes the blame for not complying with its own credit policy. Why did it let the claimant take the fall alone? Therefore, the respondent had no basis to make the deduction from the claimant’s salary as every person involved in the chain had to blame for not complying with the credit policy.
37. On the flip side, if the advertisement had not been aired, on what basis was the respondent effecting the deduction from the claimant’s salary? In that case, there would be no sale as the client would have failed to come through and complete the order.
38. Whatever the case, whether the advertisement was run or not, the respondent had no justified reason to deduct the sum of Kshs 232,000/= from the claimant’s salary.

Whether the claimant is entitled to unpaid house allowance

39. The claimant seeks unpaid house allowance in the sum of Kshs 614,250/=. In her testimony before Court, there was no provision for house allowance in her pay slip. She further averred that the salary paid to her was not consolidated. To this end, she placed reliance on her payslip.
40. On the other hand, the respondent through the testimony of RW1, maintained that the claimant’s salary was consolidated in as much as it is not indicated in her contract of employment.



41. In support of her claim, the claimant has placed reliance on her payslip which she avers, had no component of house allowance. With due respect, that argument cannot stand, since a payslip is not the appropriate source of reference in interpreting contractual terms of employment between parties. Such was the holding by the court of Appeal in Nairobi Civil Appeal 228 of 2017; *Grain Pro Kenya Inc Ltd vs Andrew Waitthaka Kiragu*.

“Counsel for the appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract.” Underlined for emphasis

42. That said, I am enjoined to revisit the claimant’s contract of employment which provides as follows at clause 4: -

“

“4. Remuneration

By way of remuneration for the services under this agreement the company shall, pay to the executive a gross taxable salary at the rate of Kshs 35,000 per month....” Underlined for emphasis

43. The *Black’s law dictionary*, 10th Edition defines gross income as the “Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings.”

44. A clear construction of the definition above, is that the term “gross” refers to all income payable. Presumably, these includes allowances. To buttress this finding, I draw support from the case of *Samson Omechi Ongera vs Tusker Mattresses Limited* [2018] eKLR, where the court found that “Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime.”

45. I will arrive at a similar finding in this case and determine that the claimant’s salary was inclusive of house allowance. As such, the claimant’s prayer in that respect is denied.

Is the claimant entitled to unpaid leave?

46. The claimant seeks accrued unpaid leave from as far back as 2010 until 2014. The respondent contends that the claimant took annual leave in accordance with the Human Resource Manual and Procedures and that there was no evidence that she applied for leave at any one time and the same was rejected.

47. As per the Employee Handbook exhibited by the respondent, the claimant was entitled to leave for 21 days. Clause 7.13 is relevant as it provides as follows as regards carrying over of leave: -

“Any leave not taken by June 30, each year will automatically be forfeited.”

48. This clause is in direct conflict with the provisions of Section 28 (4) of the *Employment Act* which provides as follows:

“The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.”



49. I am therefore inclined to agree with the claimant to the extent that the question of forfeiture of leave does not arise subject to the same being taken within the 18 months period ascribed under section 28(4) of the *Employment Act*.
50. In this regard, the claimant is entitled to outstanding leave, only for the last 18 months to her exit, which thus falls within the period starting July, 2013 until January, 2015. From the claimant's leave application forms exhibited by the respondent, the outstanding leave days thus total 22 in number.
51. I must add that the claimant's averment that she applied for leave but was denied, is not substantiated. Thus, the claim dating back to 2010 until June 2013 is denied.

Orders

52. Accordingly, I enter Judgment in favour of the claimant against the respondent and she is awarded: -
- a. Salary deduction in the sum of Kshs 232,000/=.
 - b. Accrued leave pay in the sum of Kshs 57,750/=.
 - c. Total award is Kshs 289,750/=.
 - d. Interest on the amount in (c) at court rates from the date of Judgement till payment in full.
 - e. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr Wambugu

For the Respondent Ms Kaunda

Court Assistant Abdimalik Hussein

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

