



**Kenya Union of Commercial, Food and Allied Workers v Market Dimension Limited  
(Cause E025 of 2021) [2022] KEELRC 13217 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13217 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E025 OF 2021  
ON MAKAU, J  
NOVEMBER 17, 2022**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**MARKET DIMENSION LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant is a registered trade union and brings this suit on behalf of its member Ms. Victoria Murugi Ileri (hereinafter called the grievant). The suit seeks to recover terminal dues totaling to Kshs.750,957.60 made up of overtime and public holidays worked plus salary underpayment.
2. The Claimant's case is that the grievant was employed by the Respondent in one of its shops in Embu town from 1<sup>st</sup> January, 2015. The engagement was based on yearly contract which was renewed every other year. Her salary was Kshs.14,804.35 per month with no allowances throughout her term of service.
3. In the beginning of September 2018, the Respondent opened a new shop and directed the grievant to move there with extra duties of training the new Product Consultant. The grievant felt that she could not deliver as a trainer but the Respondent did not want to hear her protests. As a result she served a resignation letter on 4<sup>th</sup> September, 2018.
4. The Claimant avers that the grievant was reporting to work at 8.30 am and leave at 6.30 pm six days a week including public holidays. It further averred that the Claimant was performing duties of a Salesman and therefore she was entitled to the salary of a Sales Person plus house allowance at the rate of 15%. It pleaded that the basic salary for Salesman under the General Wage Order of 2018 was Kshs.23,731.80 plus 15% being house allowance to give a total of Kshs.27,291.60.



5. The dispute herein was referred to the Labour Office for Conciliation but the Respondent failed to cooperate, hence this suit.
6. The Respondent filed Response to the Claim on 28<sup>th</sup> July, 2021 admitting that it employed the grievant from 1<sup>st</sup> May, 2017 under one-year contract as a Shop Assistant and she was lawfully remunerated until her voluntary resignation. It is Respondent's case that the grievant's salary was consolidated and there was no separate component of house allowance attached to the remuneration.
7. The Respondent further avers that the grievant never worked overtime or on public holidays as alleged and contended that all its staff were made aware of the holidays through telephone, letters and emails.
8. Finally the Respondent prayed for the suit to be dismissed with costs because the grievant left employment voluntarily.
9. The parties agreed to dispense with oral hearing and opted to rely on the written statements filed by their respective witnesses and then file written submissions to dispose of the suit. However only the Claimant filed its submissions.

### **Evidence**

10. The Claimant relied on the statement written by the grievant dated 27<sup>th</sup> April, 2021 and bundle of documents in the list also dated 27<sup>th</sup> April, 2021. In brief the grievant stated that she was employed by the Respondent on 1<sup>st</sup> April, 2015 as a Product Consultant/Sales Person in the Respondent's shop that was selling mobile phones and accessories. Her monthly salary was Kshs.14,805.35 without house allowance. She was working from 8.30 am to 6.30 pm but she was not paid overtime. She also worked during public holidays without being compensated. Her employment was on the basis of one-year term and her salary remained constant. She contends that she was underpaid for the 4 years she worked there.
11. The grievant further states that in September 2018, the Respondent opened a new shop and directed her to train a new Product Consultant over and above her contract duties. She did not have training skills and the new assignment was making it difficult for her to meet her monthly targets. She tried to explain her difficulties to the Respondent without success and therefore she resigned from employment on 4<sup>th</sup> September, 2018.
12. The grievant contends that her terminal benefits were not paid after the resignation forcing her to file this suit. She tabulated the terminal dues payable as Kshs.750,957.60 made of public holidays and overtime worked plus salary underpayment.
13. The Respondent relied on the statement written by its Human Resources Officer Ms. Sabina Njagi dated 22<sup>nd</sup> February, 2022 and a bundle of documents in the list dated even date. In brief the witness admits that the grievant was employed by the Respondent as a Product Consultant on a yearly contract. The last contract was from 1<sup>st</sup> May 2017. She contends that Product Consultant was a job title for a Shop Assistant as can be seen in the grievant's job description in schedule 1 of her Contract of Employment.
14. The witness denied the alleged salary underpayment save for a sum of Kshs.88,079.27 as calculated in the document titled Work Out. The Respondent is ready to pay the said sum. The witness denied the claim for overtime and maintained that the grievant was working from 8.00 am to 5.30 pm being 8 hours from Monday to Saturday. There was also a lunch break of one hour. Anyone wishing to work extra time was required to seek written approval first from the supervisor. She contended that the grievant never applied to work overtime.



15. The witness further denied the claim for public holidays worked and contended that the Claimant was attached to a Clients Shop and she was not supposed to work on any day other than the one in the contract. She further averred that the Respondent never used to have its employees work on public holidays or off days and referred the court to the bundle of emails on record as evidence of her allegation.
16. The witness further stated that the Claimant never complained of working overtime or on public holiday during his time of service. The claim for overtime and public holidays worked is therefore an afterthought according to the witness.
17. The witness further denied the allegation that the grievant was forced to train or do work that she was not hired to do. The witness contended that if indeed the grievant resigned due to the alleged extra work, the same would have been cited in the resignation letter as the reason for the resignation. She maintained that the Claimant was only employed as a Shop Assistant and her resignation on 4<sup>th</sup> September, 2018 was voluntary.
18. Finally the witness stated that the grievant was paid all her terminal dues and a Certificate of Service issued to her after the resignation.

### **Analysis and Determination**

19. I have carefully considered the pleadings, evidence and the submissions filed. It is a fact that the grievant was employed by the Respondent as a Product Consultant on one-year contract basis the last one running from 1<sup>st</sup> May 2017. It is also a fact that the said contract lapsed on 30<sup>th</sup> April, 2018 but the grievant continued working until 4<sup>th</sup> September, 2018 when she resigned. The only issue in contest is whether the Claimant is entitled to the terminal dues tabulated at Kshs.750,957.60.

### **Overtime pay**

20. The Claimant seeks Kshs.345,513.60 as compensation for overtime worked equaling to 1,728 hours for 4 years. The Respondent denied the claim and averred that the grievant was required to seek written approval from her supervisor before working extra time. It further averred that the grievant never sought any approval to work overtime and she never worked over time.
21. The Claimant has not adduced any evidence to rebut the foregoing evidence. It has also not rebutted the allegation that the grievant was attached to a Client's Shop as a Product Consultant to work on the days and hours stipulated in her contract of service and in case extra time was required to seek written approval first from the supervisor. Consequently the court finds that the claim for overtime worked has not been proved on a balance of probability.

### **Public holidays**

22. The Claimant prays for Kshs.46,185.80 as compensation for 44 holidays worked within 4 years. The Respondent denied the claim and averred that its employees never works on public holidays. For emphasis, it produced a bundle of emails written to all its staff including the grievant notifying them of public holidays and that the offices will remain closed during the respective public holidays. It averred that if the grievant made private arrangement with the client she was attached to work on the public holidays, then the Respondent was a stranger to the same.
23. The Claimant has not rebutted the Respondent's evidence especially the emails produced as evidence of breaks during public holidays. Consequently, the claim for compensation for public holidays worked also fails.



## **Underpayment**

24. The Claimant has tabulated the alleged salary underpayment from May 2015 to August 2018 as Kshs.359,258.20. The basis of that tabulation is that the grievant was Sales Person and her salary ought to have been the one published in the General Wage Order plus 15% as house allowance.
25. The Respondent made her own tabulation in the document identified as Work Out in the Respondent's list of documents. It seems that the Respondent calculated the underpayment using Minimum Wage for Shop Attendant as gazette in the General Wage Orders of the period of 4 years that the grievant worked.
26. The question that arises is whether the grievant was a Sales Person or a Shop Assistant. Having carefully perused Schedule I and II to the Employment Agreement, I am satisfied that the grievant was a Shop Assistant. The duties and the roles involved helping in selling her employer's brands, respond to customer queries, make regular reports on sales and stock levels, regular training on ranging brands, maintain visibility of dispatched materials in the outlets among others.
27. The said roles in my view involved supporting the Respondent's clients (outlets) to sell the company brands by training and even answering questions from customers. She was appointed as a Consultant not as a Sales Person. Consequently the court is satisfied that the correct salary for the grievant was that of a Shop Assistant and not Sales Person.
28. The Claimant admitted that the grievant was employed on yearly contracts. It means that each contract term was distinct from the other and they cannot be treated as a continuous contract term. The benefits for each contract term were subject to limitation period of 3 years within which to file suit.
29. In this case the suit was filed on 3<sup>rd</sup> May, 2021 and therefore any claim for the period before 3<sup>rd</sup> May, 2018 is time barred by dint of Section 90 of the *Employment Act*. However since the employer has admitted liability to pay Kshs.88,079.27 which is much higher than the Kshs.51,697.00 which the grievant has computed for the period between 3<sup>rd</sup> May, 2018 and 4<sup>th</sup> September, 2018 when she resigned, I allow the claim for salary underpayment to the tune of Kshs.88,079.27 admitted by the Respondent. I further award house allowance of 15% of the Kshs.88,079.27 equaling to Kshs.13,211.89.
30. In conclusion, I enter judgment for the Claimant in the sum of Kshs.101,291.16 plus costs and interest from the date of the judgment. The award is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER, 2022.**

**ONESMUS N. MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the *ELRC Procedure Rules* which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

