



**Kenya Hotels and Allied Workers Unions v Nyanza Club (Cause E084 of 2021)
[2022] KEELRC 13167 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13167 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E084 OF 2021
CN BAARI, J
NOVEMBER 10, 2022**

BETWEEN
KENYA HOTELS AND ALLIED WORKERS UNIONS CLAIMANT
AND
NYANZA CLUB RESPONDENT

JUDGMENT

1. The Claimant filed her suit vide a Memorandum of Claim dated December 7, 2021, and filed on similar date. The Claimant seeks payment of terminal dues and accrued rights including 30 days of leave not taken, 33 public holidays worked and not paid, a service gratuity pay for 24 years of service and wages underpayment all amounting to Kshs 782,208.00/
2. The Respondent entered appearance through the Firm of Ngala Awino & Company Advocates on December 21, 2021, and proceeded to lodge a Memorandum of Response dated January 17, 2021 and filed on similar date.
3. The case was heard on May 31, 2022 and concluded on June 29, 2022, with the closing of the Claimant's case. The Claimant testified in support of her case, she adopted her witness statement and produced her bundle of documents. Though the Respondent filed a response and a bundle of documents, no witness was called to produce the documents.
4. Both parties filed submissions in the matter, and which have been duly considered.

The Claimant's Case

5. The Claimant's case is that the grievant; Celine Adhiambo Onyango, was engaged by the Respondent on December 1, 1996, as a Receptionist where she served for 24 years in the same capacity up to December 1, 2020.



6. It is the Claimant's case that the grievant served the Respondent with a notice of resignation dated October 2, 2020.
7. The Claimant states that the grievant earned a monthly gross salary of Kenya Shillings 24,041/- as at the time of resignation. It is the Claimant's further case that the grievant had one year of leave balance at the time she terminated her services with the Respondent.
8. It is the Claimant's case that the grievant worked on public holidays without compensation. The Claimant further avers that the grievant was underpaid by the Respondent for 32 months from May, 2018 to December, 2020.
9. It is the Claimant's case that the Respondent refused and/or neglected to pay the grievant's terminal dues and accrued rights. It is the Claimant's assertion that the grievant reported the matter to her, as their member, and they wrote to the Respondent a letter dated May 7, 2021, tabulating the grievant's claim and demanding for its settlement.
10. The Claimant states that the Respondent blatantly refused to pay the grievant her terminal dues and accrued rights, leaving the Claimant no option but to report the matter to the Minister for Labour for conciliation.
11. The Claimant states that the Respondent has to date declined to honour the findings and recommendation of the conciliator.
12. The Claimant states that the Respondent has to date failed to pay the grievant her terminal dues and accrued rights.

Analysis and Determination

13. I have considered the pleadings, the witness' oral testimony and the parties' submissions. The Claimant's case presents just one issue for determination, which is whether the Claimant is entitled to the remedies sought.
14. The Claimant's assertion is that the grievant who is their member, resigned from the service of the Respondent to pursue other interests. Her only issue is that upon leaving the service of the Respondent, the Respondent refused, declined and/or neglected to pay her terminal dues.
15. The question for this court to debunk, is whether the grievant is entitled to the reliefs sought, being 30 days of leave not taken, 33 days of public holidays worked, a service gratuity and wage underpayment.

Leave

16. The Claimant contends that the Respondent owes the grievant 30 days of leave that she did not utilize. The Respondent/employer, is the custodian of leave forms, and which were not produced in evidence to show that the grievant utilized her leave days.
17. Leave forms are a record of the employer and which by law the employer is required to keep and which would in this case, have enabled the Respondent to easily prove or disapprove this claim.
18. I find the claim for unutilized leave merited, and is hereby awarded as prayed.

Public Holidays Worked

19. The Claimant's case is that the grievant worked for a total of 33 days on public holidays that were not compensated, and hence her claim. The Claimant, and by extension the grievant, was under obligation



to prove her claim. She did not specify the particular holidays that she worked, nor lead evidence to show that indeed she worked on a public holiday (s) and that no payment was made to her in that respect.

20. The claim was not proved and it fails and is dismissed.

Service Gratuity

21. The Claimant's contention is that the grievant is owed a service gratuity for the 24 years she was in the service of the Respondent. The grievant did not produce a contract of service with a provision for payment of service gratuity. The claim is premised on a Collective Bargaining Agreement (CBA), which the grievant admitted during cross-examination, that it was never signed between the Claimant and the Respondent.

22. Further, Section 35 (4) of the [Employment Act](#) states:

“Nothing in this section affects the right-

- a. of an employee whose services have been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”

23. Section 35(6) proceeds to state:

“

“(6) This section shall not apply where an employee is a member of-

- (a) a registered pension or provident fund scheme under the [Retirement Benefits Act](#);
- (b) a gratuity or service pay scheme established under a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund.”

23. In the case of [Philip Waweru Gitu v Straight Security Services Limited \(2009\) eKLR](#), the court emphasized that an employee who is a member of the NSSF as evidenced by his pay slip, is not entitled to service pay.

24. Equally, the grievant having been a contributing member of the NSSF as evidenced by the pay slips produced before court, and without prove that she was otherwise entitled to a service gratuity, is not entitled to payment of service gratuity.

25. Service gratuity is not an entitlement, and is only payable where it is expressly provided under a contract of service or a Collective Bargaining Agreement.

26. The Claimant's claim for service gratuity fails and is dismissed.



Wage underpayment

27. The Pay slips produced in evidence herein, indicates that the grievant's salary was a gross of Kshs 24,041.00, which amount included house allowance. The Claimant's assertion in respect of under payment is not proved. No evidence has been led to show that the grievant was entitled to more than what was paid.

Costs of the Suit

28. This suit having partially succeeded, the Claimant is entitled to half the costs of the suit, and I so hold.

29. Consequently, Judgment is entered for the Claimant as against the Respondent for:

- i. Payment of leave not taken at Kshs 24,041/-
- ii. The costs of the suit
- iii. Interests on (i) and (ii) at court's rates until payment in full.

30. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. E. Ngame present for the Claimant

Mr. Ngala present for the Respondent

Christine Omollo- C/A

Page 3 | 3 Cause No. E084 of 2021 - Judgment

