



**Mwangi v Total Kenya Limited (Cause 1247 of 2016)  
[2022] KEELRC 13452 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13452 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1247 OF 2016  
MN NDUMA, J  
DECEMBER 8, 2022**

**BETWEEN**

**SAMUEL MORACHA MWANGI ..... CLAIMANT**

**AND**

**TOTAL KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed on June 24, 2016, by the claimant praying for the following reliefs:-
  - (a) A declaration that the respondent was in breach, from January 1, 1999 to June 1, 2008 of the provisions of the Employment Act (no 2 of 1976) and the law by failing to provide the claimant with reasonable housing accommodation either at or near to the place of employment, or pay the claimant such sufficient sum, as rent as would enable the claimant obtain reasonable accommodation contrary to section 9 of the said Employment Act, (no 2 of 1976) (now repealed).
  - (b) A declaration that the respondent is in breach, from June 2, 2008, of the provisions of the Employment Act (no 11 of 2007) and the law by failing to provide the claimant with reasonable accommodation either at or near to the place of employment, or pay the claimant such sufficient sum, as rent as would enable the claimant obtain reasonable accommodation contrary to section 31 of the Employment Act (no 11 of 2007).
  - (c) By discriminating against the claimant contrary to section 5 of the Employment Act chapter 226.
  - (d) Kshs 15,640,015.72 being the claimant's unpaid house allowance for 192 months from January 1, 1999 to December 31, 2014 together with interest at the rate of 14% per annum until payment thereof in full.



- (e) Kshs 13,287,227.25 being the claimant's retirement severance pay.
  - (f) Costs of the suit.
  - (g) Interest on (c) and (d) above.
  - (h) Any other or further relief that the honourable court may deem fit to grant.
2. CW1, the claimant testified that he was employed by the respondent *vide* a letter dated October 10, 1985 in the position of shift supervisor in pipeline operations at a monthly salary of Kshs 7,500.
  3. The claimant worked continuously until he voluntarily retired from employment on December 31, 2014. At the time of his retirement, the claimant earned a monthly salary of Kshs 335,775 and a mileage allowance of Kshs 38,700 per the payslip for November, 2014.
  4. The respondent accepted the claimant's request to retire *vide* a letter dated November 21, 2014.
  5. The cause of action is set out under paragraphs 6 and 7 of the statement of claim and supported by the testimony of CW1 that between the years January 1, 1999 and December 31, 2014, the respondent breached its statutory obligation to provide the claimant with reasonable housing accommodation either at or near to the place of employment or pay to the claimant such sufficient sum, as rent, in addition to the salary of the claimant to enable the claimant to obtain reasonable accommodation and that it was an implied term of the claimant's letter of appointment that the claimant was entitled to a house allowance of at least 15% of the claimant's basic salary per month.
  6. The claimant produced exhibit 'D' being salary review letters dated June 10, 1993 in which the claimant's salary was reviewed to Kshs 27,960 per month and a house allowance of Kshs 4,200 per month. Another review letter dated January 23, 1995, wherein the monthly salary was reviewed to Kshs 39,585 without mention of a corresponding review of house allowance, a third letter of salary review dated July 24, 1997, wherein the monthly salary was reviewed to Kshs 54,109 per month with effect from July 1, 1997
  7. By a letter dated January 22, 1998, the salary of CW1, was reviewed to Kshs 61,008 per month with a house allowance of Kshs 7,700 and mileage allowance of Kshs 34,668. By another letter dated January 20, 2003, the monthly salary of the claimant was reviewed from Kshs 120, 45 to Kshs 123,433 which was a 2.4% costs of living adjustment. By letters dated May 23, 2006; April 5, 2007; February 23, 2010, May 10, 2011; May 6, 2012, April 30, 2013; April 25, 2014, the claimant received annual salary increments but the said letters were silent on the aspect of house allowance. These were cost of living adjustments. Annual cost of employment reports for the claimant attached to the claim for the period 2011; 2013 and 2014, show that there was no cost incurred specifically on house allowance for the period.
  8. The claimant testified that as at December 31, 2014, the claimant's accrued and unpaid house allowance was Kshs 15,640,015.72 which amount continuous to accrue interest at the rate of 14% per annum from December 31, 2014 until payment in full.
  9. The claimant has attached computation of the accrued house allowance in exhibits 'E' produced before court.
  10. The claimant testified that it was part of respondent's employment practice to grant company loan waivers to retiring or redundant employees. That this practice is evidenced by exhibits 'F' dated January 28, 2015 a letter to a colleague named Thomas M Magaya, who had been allowed to retain a Land -



Cruiser Prado Registration No KBZ 174 'F' upon his request. CW1 testified that he was not availed this opportunity for the car loan to be waived.

11. CW1 testified that the *ex gratia* payment made to him was way below the respondents' established practice of at least one (1) month's basic salary for every year of service. CW1 relied on exhibit 'J' to support this contention of discrimination. The claimant also contends that he was not paid Kshs 48,000 being unpaid leave allowance for the relevant period.
12. The claimant set out these demands in a letter of demand by his advocate dated April 14, 2016. The three claims comprise unpaid severance pay of Kshs 13,287,227.85; accrued house allowance as at that date and the unpaid leave allowance.
13. Under cross-examination, the claimant was shown letter dated December 31, 1998 and he conceded that he was placed under job group E2 and that in terms of that letter salaries were consolidated. CW1 however, stated that the subsequent payslips did not show that the basic salary was merged with house allowance.
14. CW1 stated that he got a letter on December 31, 2014 indicating that salaries were consolidated but he did not challenge it in writing but he raised the issue with the human resource office at the time. CW1 stated that he had no evidence on the 14% interest claimed. CW1 produced the record of Mercy Muchiri an administration manager whose details do not reflect the alleged consolidation of salary. CW1 stated that salaries of staff should be uniform regardless of cadre they were in.
15. CW1 stated that he retired with only three (3) months to go before the retirement date which was due upon attainment of 60 years. CW1 stated that he did not know what agreement was reached between the claimant and Thomas Maganga on terms of early retirement. CW1 stated that Mr Maganga was in different cadre as himself. That he obtained a copy of the letter he produced from Mr Maganga.
16. CW1 stated that he did not know if service pay was paid upon early retirement but he was paid *ex gratia* payment and he received his pension which comprised a one-off payment. CW1 prays to be paid. RW1 Victoria Tsalwa testified for the respondent and adopted a witness statement dated June 17, 2021 as her evidence in chief.
17. On the material issues before court, RW1 testified that by a letter dated December 23, 1998, the terms of service of the claimant and other employees changed in that new job categories were introduced. Employees were clustered into three (3) categories. In terms of the said letter, all salaries were consolidated and were to be paid through the payroll and taxed. This consolidation was beneficial to the employees including the claimant in that pension payable would be calculated based on the consolidated salary unlike in the past where both house and mileage allowance did not count for pension payment.
18. According to the letters produced by RW1, on September 17, 2014, the respondent wrote to the claimant notifying him of his impending retirement effective on March 6, 2015. The claimant replied to the said letter notifying the respondent of his intention to retire on December 31, 2014 after serving the respondent for 29 years. The respondent replied to the request by the claimant by a letter dated September 21, 2014 and informed the claimant that his retirement would be effective January 1, 2015. The letter indicates that the issue was discussed and agreement reached by the parties. Outstanding leave of 32.72 was acknowledged in the said letter. RW1 testified that the claim for payment of separate house allowance has no basis since that ended on December 23, 1998, when salaries were consolidated.
19. RW1 testified that salaries of the claimant were reviewed from time to time up to the date of his retirement and not once did he write to the company to complain about non-payment of his house



- allowance. That the salary increments were based on a consolidated salary and the claimant also received bonus payments to recognize his good service.
20. That as at October 30, 2009, the claimant's new position was planning and supply operations coordinator following merger of Total Marketing Kenya Limited and Total Kenya Limited. The claimant accepted the new position with effect from September 1, 2011, the position changed to supply coordinator (imports) back office until his notification of retirement. retirement policy of the respondent is that employees retire at 60 years of age. However, the respondent accepted the claimant to retire (3) months prior to his attainment of 60 years.
  21. That there is no requirement for retiring employees to be paid severance pay since the employees including the claimant are well covered under the respondent's retirement benefits scheme. That claim for severance pay has no legal or any contractual basis and it be dismissed. That the claimant had not taken any loan with the respondent which would have required any waiver. This claim according to RW1 is equally misconceived and without basis.
  22. That the *ex gratia* payment of Kshs 976,545.64 paid to the claimant was done in good faith and in recognition of the claimant's long service. That this was purely, a discretionary payment.
  23. RW1 prays the suit be dismissed with costs.
  24. The parties filed written submissions and the issues for determination are:-
    - (i) Whether the claimant is entitled to payment of any of the terminal benefits sought in this suit.
  25. A careful analysis of the evidence adduced by the claimant and that adduced by RW1 leads to the conclusion that the claimant served the respondent faithfully and in various positions for a period of 29 years. That the claimant was employed on October 10, 1985 and retired voluntarily, from the employment of the respondent on January 1, 2015. That at all material times, the claimant was under a group pension scheme for the employees of the respondent and he was paid a one-off pension upon his retirement. That the contract of employment between the claimant and the respondent at the time of retirement did not provide for payment of severance pay, upon retirement, be it early or on the designated date of retirement. The *Employment Act*, does not also provide for payment of severance pay to a retiring employee who is covered by a group pension scheme as was the case with the claimant. This claim is misconceived and is dismissed.
  26. The claim for payment of leave allowance has also not been proved by the claimant who bears the onus to do so.
  27. In terms of the letter of retirement, the respondent conceded that the claimant had a balance of 32.72 outstanding leave days. Payment was clearly made to the claimant in lieu of these outstanding leave days. Leave allowance and or leave travel allowance is only paid when an employee actually goes on leave. It is a facilitation payment. There is no evidence that the claimant required any such facilitation upon his retirement. The claim for payment in respect of leave allowance is misconceived and is equally dismissed.
  28. There is clear evidence that prior to the issuance of the letter dated December 23, 1998, by the respondent to its employees, the claimant like other employees was paid a basic salary and a house allowance.
  29. In terms of the said letter of December 23, 1998, all salaries of employees including that of the claimant were consolidated so that the house allowance and travel allowance components were consolidated with the basic salary.



30. RW1 explained this consolidation was beneficial to the employees including the claimant in that the entire consolidated pay, commonly known as gross pay, would be used to calculate the pension payable upon retirement. It cannot be disputed that, the claimant received a much higher pension than he would have, had the pension been based only on the basic salary paid.
31. The claimant did not adduce any evidence that he was dissatisfied with the new arrangement the basis of which he continued to be paid until he retired more than 16 years later. This claim is not valid at all. Even if it was, it would be time barred by dint of *Limitation of Actions Act*, cap 22 laws of Kenya which mandates any claim based on contract to be filed in court before expiry of six years.
32. In the present case, the claim for payment of house allowance has not been proved by the claimant and is also dismissed.
32. In the final analysis, the suit by the claimant against the respondent lacks any merit and is dismissed. The claim was in the court's view completely unwarranted, the respondent having treated the claimant lawfully and fairly upon his request to retire a few months before attainment of his actual retirement date which request was acceded to by the respondent. Due to the long service by the claimant to the respondent, there will be no orders as to costs.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Omolo for claimant

Mr. Wakhisi for Respondent

Ekale – Court Assistant

