



**Waweru v Eddahs Hope Cancer Center (Cause 807 of 2017)  
[2022] KEELRC 13395 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13395 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 807 OF 2017  
JK GAKERI, J  
DECEMBER 5, 2022**

**BETWEEN**

**VALERIE WAWERU ..... CLAIMANT**

**AND**

**EDDAHS HOPE CANCER CENTER ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated April 27, 2017 filed on May 2, 2017, the claimant sued the respondent for unpaid salary, outstanding leave days, repayment of certain monies, service pay and a certificate of service.
2. The claimant avers that she was employed by the respondent on September 1, 2015 as Vice-President of the respondent to oversee all project activities and act as the contact point for donors and support.
3. That her starting salary was Kshs 15,000/= per month but was raised to Kshs 70,000/= in March 2016 and was payable through the bank.
4. It is the claimant's case that the respondent owes her unpaid salary as follows;  
September 2015 Kshs 15,000  
October 2015 Kshs.15,000  
March 2016 Kshs 40,000  
April 2016 Kshs 20,000  
May 2016 Kshs 20,000  
June 2016 Kshs20,000  
July 2016 Kshs 20,000



August 2016 Kshs 16,886.80

Total Kshs 161,886.80

5. The claimant avers that the respondent did not pay for pending annual leave days nor make NHIF and NSSF contributions.
6. Finally, it is the claimant's case that she gave the respondent Kshs 45,000/= for payment of rent for its office premises in August 2016 and the same is outstanding.
7. That she was not registered for any provident fund and claims service pay.
8. The claimant prays for:
  - i. Leave pay for 5 days Kshs 16,886.80
  - ii. Withheld salary Kshs 161,886.80
  - iii. Refund of Kshs 45,000
  - iv. General damages on account of pray (iii)
  - v. Service pay Kshs 50,660.4
  - vi. Certificate of Service
  - vii. Costs of the suit.

#### **Respondent's case**

9. Although the claim was served upon the respondent on May 5, 2017 and it entered appearance on June 2, 2017, it did not file any response.
10. The Deputy Registrar fixed formal proof hearing on July 28, 2022 when the claimant testified in court. The counsel holding brief for the claimant's counsel informed the court that he would not be filing any submissions.

#### **Claimant's evidence**

11. The claimant's written statement dated April 7, 2017 rehashes the contents of the memorandum of claim.
12. In her evidence in chief, the claimant testified that the respondent employed her on September 1, 2015 and she resigned on August 4, 2016.
13. It was her testimony that although her starting salary was Kshs 15,000/= per month, it was raised to Kshs 70,000/= from March 2016 but was not paid in full in March, April, May, June and July and none in August, 2016.
14. That salary was payable through the bank and the Respondent had not paid the salary for November and December 2015.
15. The claimant further testified that she gave the respondent Kshs 45,000/= to pay for rent for its office premises but the amount was not reimbursed and had evidence of the payment.
16. That she took 2 leave days only and was not paid for the outstanding days.
17. That statutory deductions were made but not remitted and no payslips were issued.



18. The claimant did not file submissions.

### Determination

19. The singular issue for determination is whether the claimant is entitled to the reliefs sought.

20. As the suit here is undefended, the court is guided by the sentiments of Onyango J in *Humphrey Munyithya Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR as follows:

“In the case of *Monica Kanini Mutua v Al-Arafat Shopping Centre and another* (2018) eKLR, the court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of employment.”

21. It is not in dispute that the claimant was an employee of the respondent pursuant to a written agreement dated September 1, 2015 signed by both parties. Under the terms of the contract, the claimant was entitled to 21 working days as annual leave after completion of 6 months of service and a salary of Kshs 15,000/=. The claimant was a fulltime employee of the respondent.

22. It is also not in dispute that the claimant resigned on August 4, 2016 after giving the employer a one month notice effective July 4, 2016.

23. As regards the specific claims made by the Claimant, the sentiments of Abuodha J in *Nicholas Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR are instructive.

“The settled rule in all civil claims is that a party who intends a court to find or decide any matter in his or her favour must prove the allegations to the required standard of proof in civil claims which is on a balance of probability . . .

This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”

24. The claimant attached documentary evidence comprising payment vouchers of monies paid by the respondent as salaries and allowances as follows;

1. November 30, 2015 Kshs 75,000/=
2. December 15, 2015 Kshs 78,170/=
3. January 29, 2016 Kshs 75,000/=

25. From the documents, it is unclear to whom the amount was payable. Further, the claimant has provided salary advice to Barclays Bank of Kenya for February, March, April, May 2016 and June 2016. The total amount paid to the claimant for the duration is Kshs 195,700/=.

26. These bank advisories show that the claimant’s salary was never paid in full and the balance had accrued to her by the end of a very month.



27. For the month of August 2016, the claimant's resignation letter stated that she would leave on August 4, 2016 and there is no evidence that she worked on August 5, 2016; a total of 4 days in August not 5 as claimed. In total, the respondent owes the claimant the sum of Kshs 158,509.44 as unpaid salary.
28. As regards the sum of Kshs 45,000/= claimed as reimbursement, a statement on record shows that the claimant made deposit of Kshs 45,000/= to Account No 01018xxxxx000 Standard Chartered on August 1, 2016 and the same is due to her.
29. On outstanding leave days, apart from the letter of resignation which is explicit on outstanding leave days, email communication on record show that the parties communicated on the leave days and as the claimant's evidence is uncontroverted, the same is deemed merited.
30. As regards service pay, it was the duty of the Respondent to not only register the claimant as a member of the National Social Security Fund (NSSF) but deduct and remit her contribution and its contribution to the NSSF on a monthly basis. Having failed to do so, the claimant is entitled to the service pay.
31. Prayer (d) of the memorandum of claim is unclear and is dismissed.

#### **Certificate of service**

32. Section 51 of the *Employment Act* provides that;  
An employer shall issue to an employee a certificate of service upon termination of the employment unless the employment has continued for a period of less than four consecutive weeks.
33. The claimant was an employee of the respondent for about 11 months and is thus entitled to a certificate of service.
34. In the end, judgement is entered for the claimant against the respondent in the following terms;
  - a. Outstanding leave for 4 days
  - b. Withheld salary arrears Kshs 158,509.44
  - c. Refund of Kshs 45,000
  - d. Service pay
  - e. Costs of this suit
  - f. Certificate of service
  - g. Interest at court rates from the date hereof till payment in full.
35. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF DECEMBER 2022**

**DR. JACOB GAKERI**

**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> March 2020 and subsequent directions



of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

