



**Maithya v Manpower Networks Limited (Cause 2302 of 2017)
[2023] KEELRC 622 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 622 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2302 OF 2017
AN MWAURE, J
MARCH 2, 2023**

BETWEEN

ALPHONSE MAITHYA CLAIMANT

AND

MANPOWER NETWORKS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the claim dated the 20th of November 2017 seeking payment of holiday pay and unpaid house allowances. He is also claiming non-remittance of NSSF contributions and non-issuance of Certificate of Service.

Claimant's Case

2. The claimant says he was employed by the Respondent on the 1st day of June 2011 on permanent and pensionable terms as a machine operator and carried out his duties diligently and faithfully as assigned to him by the Respondent. He says he was engaged in the said employment with the Respondent until the 26th day of April 2017 when he tendered his resignation. He was earning a basic salary of ksh 13,800/=. The Respondent paid the claimant ksh 12,893 upon his resignation.
3. The claimant says that whilst under employment with the Respondent he did not receive any house allowance neither was he accorded any accommodation whatsoever. The claimant asserts that he was forced to work during National Holidays without receiving any compensation. The Respondent deducted from the claimant's salary, NSSF contribution for the month of April 2017 but never remitted the same to the Social Security Fund.
4. The claimant prays that the court makes an award for the following;
 - i. House Allowance $15/100 \times 13,800 = 2070 \times 46$ (months)= Ksh 95,220/



- ii. Public holidays 48 holidays, $13,800/26 = 523.1 \times 48 = 25,108.8 \times 2 = \text{ksh } 50,217.6/$
- iii. NSSF Contribution for April 2017 ksh 400
Total Ksh 145, 837.6
- iv. Certificate of Service

Respondent's Case

- 5. The Respondent filed the memorandum of reply to the claim on the 20th December 2017 and says that the claimant was paid and acknowledged receipt of all his terminal dues and thus he has no claim whatsoever against the Respondent.

Claimant's Evidence

- 6. The claimant, Alphonse K Maithya gave sworn testimony and adopted the memorandum of claim dated the 20th November 2017 as well as the documents contained in the list of exhibits 1-4 and prayed for compensation for the benefits for the years worked as per the claim.
- 7. In cross-examination, He said that he is a Beng placer which is the same as a machine operator and resigned from his employment. He told court he was earning ksh 13,800/= per month but the amount differed from month to month. He also said he had no evidence that he was earning ksh 13,800/= and in April 2016 he received ksh 12,893/= and he said he had Mpesa records for that amount. He also said that they were paid according to how they worked and there is no proof they worked on public holidays. The Respondent did not remit the NSSF for April 2017 according to the claimant. He filed the claim on 20/11/2017 and received the payment seven months later.

He says he worked for six years and he was never given an appointment letter.
- 8. On re exam he said that the Respondent have not denied he was their employee and he would not work 6 years without pay. He used to work on public holidays but company has the records. He said the employer is supposed to give house allowance which was not given.

Respondent's Evidence

- 9. The Respondent witness James Tsuma gave sworn testimony and said that he is employed by the Respondent as Operations Manager. He adopted his witness statement dated 25th February 2020 as his evidence in chief. He said that the claimant was employed as packer of cement. It was a temporary contract which varied from time to time and he was paid according to work done. He said that the terminal dues were paid as per the letter dated the 8/5/2017 and disclaimer form which is however not in the file.
- 10. In cross examination he said that the claimant joined the Respondent in June 2011 and the witness was already employed when claimant joined in June 2011. He retaliated that claimant was paid as per the work done and was paid by cash. There was no allowance except the salary as payment included everything. The rates were different when he worked on public holidays. They paid for the National holidays. On re-examination he said that it is employee to choose if he wants to work on national holidays. The claimant worked on casual basis and so would not be paid house allowance.



Claimant's Written Submissions

11. The claimant in his submissions says he never received any house allowance as his salary, which the Respondent witness Mr James Tsuma RW1 confirmed was basic salary and had no other allowances on top. It therefore did not include house allowance.
12. The claimant relied on the case of *James Waitbaka Kiragu v Grain Pro Kenya Inc Ltd* 2017 where the court said that:

“In claim for house allowance, section 31 of the *Employment Act* makes provision for house allowance where no housing is given to the employee. On the open-ended contract such as the one issued to the claimant, where no allowance or housing was given and based on the claim for the same, such is due. The claimant is awarded ksh 571,531.00 in house allowances.”
13. The claimant urged the court to hold that the Respondent was in breach of section 31 of the *Employment Act*.
14. The claimant further submits that he worked for 6 years on National and Public Holidays without compensation contrary to section 10 (3) (a) (i) of the *Employment Act* 2007 which entitles an employee to annual leave days, public holiday pay, etc. he also says that the Respondent disregarded its duty to compensate the claimant for the public holidays worked as per the stipulations of the *Employment Act* 2007 and urged the honourable court to hold so.
15. It has been further submitted that NSSF contribution of the month of April 2017 was deducted but never remitted to the authority and it is only fair that the said deduction be refunded to the claimant.

Respondent's Written Submissions

16. The Respondent relied on the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* 2016 eKLR quoted in *Patrick Lumumba Kimuyu v Prime Fuels K Limited* Civil Appeal No. 18 of 2018 where the Court of Appeal observed that:

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it is arrived at.. the court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation and public holidays worked is without fault. That ground of appeal must therefore fail.”
17. The Respondent submits it is a basic principle in the Law of Evidence that he who alleges must prove. He submits that the claimant alleged he worked continuously for the Respondent for 6 years but was never compensated for the National holidays he worked. It was therefore upon the claimant to provide documentation that he indeed worked for the 6 years but was never compensated. The burden of proof would then shift to the Respondent to prove whether or not the claimant was compensated for the work done during the public holidays. The claimant in his statement adopted did not satisfy this rule thus not proving that indeed he is liable for compensation.



18. The Respondent also relied on the decision in *Krystal line Salt Limited v Kwekwe Makele & Others* Civil Appeal No. 79 of 2015 where the Court of Appeal held that: “The *Employment Act* recognises four main types of contracts of service; contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment. Piece work form of employment is defined in section 2 to mean; “...any work the pay of which is ascertained by the amount of work performed irrespective of the time occupied in its performance” In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece work arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.
19. The Respondent argued that the claimant testified in court that his salary was not constant and it would depend on the amount of work he had done in that respective month and the payment would vary according to the amount of work which is indication that he was on piece work and therefore not entitled to house allowance.

Determination

20. The court has considered the pleadings and the evidence in the present claim. The sole issue for determination is whether the claimant has pending dues which were payable but not paid to the claimant. The claimant was no doubt employed in piece work form of employment covered under section 2 of the *Employment Act* 2007. Claimant admits in evidence that he was paid according to the work he performed. He did not have a fixed salary but was paid according to the work performed.
21. Section 2 of *Employment Act* 2007 provides: - “piece work means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.” The case of *Krystaline Salt Limited v Kwekwe Mwakele & Others* Civil Appeal No 79 of 2015 on issue of piece work stated as follows: “an employee under piece work arrangements though not entitled to or some of the benefits of the other forms of employment is at least entitled to minimum wage.
22. From the evidence on record claimant was on piece work arrangement. There was one contract produced dated 1st June 2011 and was for three months. The court did not see any other written contract. The claimant states he worked for the respondent from June 2011 till his resignation in April 2017. He does not dispute that he was paid kshs 12,893/- at his resignation. The court noted that he voluntarily resigned from his employment and did not raise any issues of unpaid dues at that point. Neither does he seem to have raised any issues during the 6 years he worked for the respondent. It is curious that he raised the issues of none payment of some dues only after he resigned.
23. The claimant prays for Kshs 95,220/- being unpaid house allowance. There is no evidence produced to even to show what salary claimant was receiving and what it comprised. The only thing claimant has informed the court is that the claimant received salary that was not fixed but would differ depending on work done. Also the 46 months he claimed he worked for the respondent he never alluded to the fact that he was demanding house allowance. It is the court’s contestation that the pay the claimant received can only be taken as “basic pay” for the piece work performed from time to time. Persuaded by the case of *Stephen O. Edewa v Lavington Security Limited* Cause 891 of 2015 where court held that the claimant’s salary was consolidated pay that included house allowance and as such the claim for house allowance was disallowed. The court finds the claimant has not proved he is entitled to house allowance and his claim fails.



24. As for the claim for holiday pay, again the court finds the claimant has made mere assertions and demand for holiday allowance. He is demanding 48 holidays with no explanation or clarity on which days he missed his holidays. The fact also that he does not demonstrate he asked for his holidays and was refused can only be assumed that if at all he never took his holidays he forfeited them. Regrettably the claim for untaken holidays is not proved and is not granted.
25. The court finds the respondent indeed deducted 200/- from claimant's April salary. The claimant however admitted in his evidence in court that the amount was later remitted to NSSF. Therefore the prayer is overtaken by events.

Claimant to be issued his certificate of service within 14 days from today's date.

Each party to pay their costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF MARCH 2023.

ANNA NGIBUINI MWAURE

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 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 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

