**Petrocity Enterprises Limited v Shimoka (Appeal E014 of 2024)**
**[2024] KEELRC 2083 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2083 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**APPEAL E014 OF 2024**

**M MBARŨ, J**

**JULY 18, 2024**

**BETWEEN**

**PETROCITY ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**EMMANUEL SHIMOKA ..... RESPONDENT**

***(Being an appeal from the judgment of Hon. J.B. Kalo in Mombasa CMELRC No.E485 of 2021 delivered on 14 February 2024)***

**JUDGMENT**

1. The appeal herein arises from the judgment delivered on 14 February 2024 in Mombasa CMELRC No.E485 of 2021. The appellant is seeking that the judgment be set aside and replaced with an order dismissing the claim with costs.

2. The background to the appeal is a claim filed by the respondent before the trial court. He claimed that on 5 February 2014, he was employed by the appellant as a driver and worked until November 2019 when his employment was terminated. He was earning Ksh.21, 068 per month. He claimed that he was not paid for overtime work and travel from Likoni to Nyali to pick up his superiors. He was not paid the minimum wage and hence claimed the following;

    a. Over time from 2014 to 2019 Ksh.879,056.175

    b. Certificate of service.

    c. Any other relief the court deems fit to grant to meet the ends of justice.

3. In response, the appellant made mere denials on the employment particulars made by the respondent and that he worked overtime or was entitled to any such pay. He was paid over and above the minimum wage requirements in place during his employment and there was no overtime worked and not paid. The claims made should be dismissed with costs.

4. The trial court heard the parties and held that the respondent was able to prove that he worked overtime for 6 days each week for the entire duration of his employment until retirement and was not paid. He was awarded Ksh.879, 056.20 with costs and interests from the date of filing suit until paid in full.

5. Aggrieved, the appellant filed the appeal on grounds;

    1. The learned magistrate erred in law by failing to find that the trial court lacked jurisdiction to entertain the matter by virtue of section 90 of the *Employment Act*;

    2. The learned magistrate erred in fact in law by failing to find that the claimant for overtime in employment matters constitutes a continuing injury.

    3. The learned magistrate erred in law and fact by misapprehending the evidence and misapplying, misunderstanding and overlooking the correct legal principles and judicial precedent in the circumstances.

    4. The learned magistrate erred in law and fact by making his assumption, suppositions and conjecture in concluding that the claimant has proven that he worked overtime daily for 6 days a week from 8 am to 8 pm from the date he was employed to the date he retired.

    5. The learned magistrate erred in fact and law by finding that the burden of disproving overtime lies with the employer despite the respondent's witness specifically testifying that the claimant never worked overtime which would mean that there are no records to be produced by the respondent I that regard in the first place.

    Both parties attended and agreed to address the appeal by way of written submissions.

6. The appellant submitted that the suit is time-barred by application of Section 90 of the *Employment Act*, 2007 (the Act). The main issue before the trial court was that the alleged overtime claimed was a continuing injury which was not addressed within the provisions of Section 90 of *the Act*, which is 12 months from the date the same accrued. The respondent ceased his employment on 30 November 2019 and filed his claim on 30 July 2021 18 months later. He should have filed the claim within 12 months. In the case of *David Ngala Ochieng v Hatari Security Guards Ltd* [2022] eKLR the court held that a contractual benefit which arises out of employment accrues every month hence a continuing injury and should be addressed per the provisions of Section 90 of t*he Act*. In *Ernest Msafiri Morris v Atta (K) Limited* [2021] eKLR, the court held that claims for overtime and work during public holidays are continuing injuries and should be addressed within 12 months when they accrue.

7. In this case, the respondent should have addressed his claims for alleged overtime work within 12 months. His claims made after such a period are time-barred.

8. The appellant submitted that they proved the case to the required standard. Section 107, 109 and 112 of the *Evidence Act* require he who alleges to prove as held in *Mourine Mukonyo v Embu Water and Sanitation Company* [2020] eKLR. The respondent failed to adduce any evidence and produced schedules he drafted himself contrary to the principles addressed by the Court of Appeal in the case of *Munyinsa v Lavington Security Limited* Civil Appeal 55 of 2019. It cannot be true that the respondent worked for 6 years from 8 am to 8 pm each day. Without proving his claims, these should have been dismissed as held in *Joyce Nyaboke Maina v Napenda Kuishi Trust* [2022] eKLR. The mere allegations that the employee was engaged on a full-time basis is not sufficient and a call for evidence is necessary.

9. The respondent submitted that the claims by the respondent before the trial court were not time-barred as alleged. A continuing injury is defined by the Court of Appeal in the case of *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] eKLR to mean an injury that is still in the process of

being committed. Where during employment an injury continues to happen, the employee is insulated and can claim under section 90 of *the Act* for a continuing injury. In this case, at the end of employment, the respondent was not paid his terminal dues including overtime worked.

10. The respondent submitted that in the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR the court held that the failure of an employer to pay accrued benefits to an employee does not constitute continuing injury. Such benefit can be claimed within 3 years upon cessation of employment.

11. The respondent worked and attained retirement age as a driver. His case that he worked from 8 am to 8 pm was not challenged and the assessment and award by the trial court was proper and justified and the appeal should be dismissed with costs.

**Determination**

12. This is a first appeal. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. See *Mursal & another v Manese (suing as the legal administrator of Delphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC.

13. On the issue of the application of Section 90 of *the Act* and the question of whether the claim for overtime was a continuing injury or not, upon filing suit and serving the appellant, a Notice of Preliminary Objection dated 22 February 2022 was filed. The notice related to the application of Section 90 of the Act and the jurisdiction of the trial court to hear the claim.

14. However, through a notice dated 22 August 2022, the appellant withdrew the Notice of Preliminary Objections. I take it, that the appellant found no need to address the matter on the application of Section 90 of the Act and the challenge to the trial court jurisdiction. This matter has arisen on appeal. Being a question of law, the court must address it.

15. Section 90 of the Act allows a party 3 years to file a claim from the date the cause of action arose within the employment relationship.

16. In the case of a continuing injury, such a claim should be addressed within 12 months next after the cessation thereof. In the case of *The German School Society v Helga Ohany* [2020] eKLR the Court of Appeal addressed the question of continuing injury as follows;

17. There is no contest that a claim premised on a continuing injury must be filed within 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in *G4S Security Services (K) Limited v Joseph Kamau & 468Others* [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of "a continuing injury" as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase "a continuing injury" and whether the respondent's claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes "a continuing injury." From the record, we note that the respondent's counsel only cited the definition of 'back pay" in the Black's Law Dictionary 9th Edition on page 159 which defines it as "the wage or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary" to support her claim that back pay was a continuing state of affairs.

18. The provisions of Section 90 of *the Act* are in two parts;

> Section 90 of the Act requires that; Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (cap. 22), no civil action or proceedings based or arising out of this act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

19. At the end of employment, the employee is allowed 3 years to file his claim accruing out of employment. Within employment, where a claim or benefit accrues and is not paid, the employee is allowed 12 months to address without affecting the right to make a claim within 3 years upon cessation of employment. This would mean that, while the respondent retained his employment with the appellant as a driver, where he was not paid overtime, he would claim it within his employment within 12 months. Immediately his employment ceased, through whatever cause, this did not diminish his right to claim terminal dues within 3 years.

20. In *Obatta v Radar Limited* (Appeal E001 of 2023) [2024] KEELRC, the court held that time starts running at the end of employment to address employment claims within 3 years. Hence, to remove the employee from the benefit of the law and Section 90 on the basis that some claims can accrue within 12 months and not 3 years at the end of employment would be to visit great injustice. Indeed, the application of 12 months' claims is to insulate the employee, who while employment subsists, can lodge a claim against the employer and successfully retain his employment and be secured under the protections of Section 46(h) of the Act. Otherwise, such claims do not dissipate for the simple reason that they are not claimed within 12 months.

    The appeal to this extent is without merit.

21. On the issue of overtime claimed, indeed, as analyzed by the learned magistrate, the employer has the legal duty to keep and file work records in court. Section 10(6) and (7) of the Act and not the *Evidence Act* apply. The motions of the *Evidence Act* and the burden of proof before this court is foundationally different.

22. Once a claim is filed, the employer has the legal burden of disproving the claims made by the employee. Work schedules, timelines and application of overtime hours remain in the custody of the employer and should be produced in court once a claim is filed. See *Gilbert Kasumali Kithi v Nyali Beach Holiday Resort* [2015] eKLR.

23. Section 10(6) and (7) of the *Employment Act*, 2007 requires that;

    (6) The employer shall keep the written particulars prescribed in subsection

        (1) For a period of five years after the termination of employment.

    (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

24. Based on the respondent's claim, no work records were filed. The respondent testified to the fact that he would start his workdays from 8 am to 8 pm;

> ... I used to drive the father of the managing director. I used to take him from home to the office at 8.30 am and would take him home at 8 pm. I used to work six days a week. I used to rest on Sundays. I was not paid overtime. ...

25. Upon cross-examination, the respondent confirmed the same evidence and the fact that his work hours were from 8 am to 8 pm for 6 days each week.

26. This evidence is well captured and taken into account by the trial court. The appeal that the learned magistrate made assumptions and suppositions is without good basis. The trial court well addressed the issues before it, applied the law and made a correct finding.

27. This court cannot fault the findings and award by the trial court.

28. Accordingly, the appeal herein is without merit and is dismissed with costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF JULY 2024.**

**M. MBARŨ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....