



**Kisaingu & 2 others v Katuma & another (Cause 2285, 2286 & 2288 of 2016 (Consolidated)) [2024] KEELRC 2752 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2752 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2285, 2286 & 2288 OF 2016 (CONSOLIDATED)**

**K OCHARO, J  
OCTOBER 31, 2024**

**BETWEEN**

**ZACHARIA KIMEU KISAINGU ..... CLAIMANT**

**AND**

**JULIUS SAMMY KATUMA ..... 1<sup>ST</sup> RESPONDENT**

**KILIMBI LINE INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CAUSE 2286 OF 2016**

**BETWEEN**

**BONFACE MUSYOKA MUNYAO ..... CLAIMANT**

**AND**

**JULIUS SAMMY KATUMA ..... 1<sup>ST</sup> RESPONDENT**

**KILIMBI LINE INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CAUSE 2288 OF 2016**

**BETWEEN**

**JONES MUEMA NZULA ..... CLAIMANT**

**AND**

**JULIUS SAMMY KATUMA ..... 1<sup>ST</sup> RESPONDENT**



**JUDGMENT**

1. Through an order of the court issued on 12<sup>th</sup> June 2016, this matter (Cause Number 2286 of 2016) was consolidated with two others (Cause Numbers 2285 of 2016 and 2288 of 2016). For clarity of record, the Claimant in this file shall be hereinafter referred to as the 1<sup>st</sup> Claimant, and the Claimants in Causes 2285 of 2016 and 2288 of 2016, shall be the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants, respectively.
2. By their respective memorandums of claim filed in the stated causes, the Claimants alleging that they were at all material times employees of the Respondent, whose employment was terminated unfairly, sued the latter, each seeking for a declaration that the termination was unfair, and compensation under various heads thus;

1<sup>st</sup> Claimant

- a. One (1) month pay in lieu of notice .....Kshs 17,548.25
  - b. Unpaid salary for October 2013 ..... Kshs 17,548.25
  - c. Unpaid Safari allowance .....Kshs 106,737.36
  - d. Outstanding annual leave 21 days x 9.... Kshs 110,553.96
  - e. Off duties and Public Holidays.....Kshs 161,011.13
  - f. Overtime (3 hours per day) x 7  
21 hours xKshs 13x365 days..... Kshs 996,450.00
  - g. Underpayments Kshs 5,548.25x12x9 years.... Kshs 559,211.00
  - h. Gratuity (Service Pay) 15 days x10 years.....Kshs 78,969.12
  - i. 12 months' salary as compensation.....Kshs 210,579.00
- Total .....Kshs 2,298,605.80

2<sup>nd</sup> Claimant

- a. One (1) month pay in lieu of notice .....Kshs 17,548.25
- b. Unpaid salary for October 2013 .....Kshs 17,548.25
- c. Unpaid Safari allowance ..... Kshs 106,737.36
- d. Outstanding annual leave .....Kshs 159,689.08
- e. Off duties and Public Holidays.....Kshs 161,011.13
- f. Overtime (3 hours per day) x 7=21 hours  
xKshs 13x365 days.....Kshs 996,450.00
- g. Underpayments Kshs 7,548.25x12x13 years  
.....Kshs 1,177,527.00



- h. Gratuity (Service Pay) 15 days per year x 13 years.....Kshs 114,063.62
- i. 12 months' salary as compensation....Kshs 210,578.48
- Total .....Kshs 2,961,153.00

3<sup>rd</sup> Claimant

- a. One (1) month pay in lieu of notice ....Kshs 17,548.25
- b. Unpaid salary for October 2013 .....Kshs 17,548.25
- c. Unpaid Safari allowance ..... Kshs 106,737.36
- d. Outstanding annual leave 21 days x 9.... Kshs 110,553.96
- e. Off duties and Public Holidays.....Kshs 161,011.13
- f. Overtime (3 hours per day) x 7 days =  
21 hours xKshs 13x365 days.....Kshs 996,450.00
- g. Underpayments.....Kshs 599,211.00
- h. Gratuity (Service Pay) .....Kshs 78,969.12
- i. 12 months' salary as compensation....Kshs 210,579.00
- Total .....Kshs 2,298,605.80

3. The Respondent filed a memorandum of response in each case, denying the Claimants' claims, and entitlement to the reliefs they have sought.

**The 1<sup>st</sup> Claimant's Case**

4. The 1<sup>st</sup> Claimant testified in chief on the 31<sup>st</sup> of May 2022. He adopted his witness statement dated 10<sup>th</sup> March 2022, as his evidence in chief, and produced the documents he filed herein as his documentary evidence.
5. He stated that at all material times, he was employed by the Respondent as a driver of his public Transport Motor Vehicles from 3<sup>rd</sup> January 2004 to 10<sup>th</sup> October 2013.
6. He claimed that he was employed on the above-stated date orally at a consolidated salary of Kshs 12,000 per month, an amount he earned throughout the years he was in the Respondent's service.
7. He asserted that his salary ought to have been as per the minimum scale(s) provided for in the relevant Wage orders. In his view at all material times, the minimum wage provided was Kshs 15,259.35, plus a house allowance of Kshs 2,288.90, thus Kshs 17,548.25 per month, for medium-sized vehicles conductor/turn boy.
8. He diligently worked for the Respondent up to 10<sup>th</sup> October 2013, when the Respondent terminated his employment unlawfully and unprocedurally without giving him any justifiable reason or notice. After terminating his employment, the Respondent failed and or refused to pay him his terminal dues.
9. In a bid to resolve the matter amicably, he approached his Trade Union to intervene, but the Union's efforts did not bear fruit.



10. Cross-examined on 29<sup>th</sup> May 2023 by Counsel for the Respondent, the 1<sup>st</sup> Claimant testified that he first came into the Respondent's employment in 2022. The Respondent did not issue him with either an employment contract or a driver's badge.
11. He further testified that his salary was paid monthly and not daily. The Respondent had no specific place from which he was paying his employees' salaries.
12. The Respondent never allowed him to proceed on his annual leave at any time as he did not have reliever drivers.
13. The Claimant testified that on the material date, his vehicle developed a mechanical problem, as a result, he agreed with the Respondent that it be taken to a garage for fixing. The assertion that he abandoned the motor vehicle at the garage is untrue.

### **The 2<sup>nd</sup> Claimant's case**

14. The 2<sup>nd</sup> Claimant – Zacharia Kimeu Kisainju testified that he first came into the employment of the 1<sup>st</sup> Respondent, Julius Sammy, t/a Kililimbi Line Investment Ltd on 3<sup>rd</sup> January 2000, as a minibus driver. The registration numbers of the motor vehicle were KBU 888S. The vehicle was plying on the Nairobi – Kahawa route.
15. It was his case that in August 2013, he fell ill and was hospitalized as a result. After recovering, he applied for leave which the Respondent approved. Upon resuming duty, he worked for a week until 10<sup>th</sup> October 2013, when he was involved in an accident as his vehicle was hit by a lorry. Following the accident and notwithstanding that the occurrence of the accident was without any fault on his part, the Respondent dismissed him from employment orally.
16. As he did not have a reliever driver, he could work more than 8 hours daily. Additionally, throughout he was remunerated below the relevant minimum wage.
17. At termination, the Respondent refused and or neglected to pay him his terminal dues.
18. Cross-examined by Counsel for the Respondent the 2<sup>nd</sup> Claimant testified that he was first employed by the Respondent in January 2000, as a driver. His employment as such, was without any written agreement. His salary was normally paid at the end of every month, in cash.
19. He further testified that he did have a specific work schedule. Sometimes he could start his work day at 5:00 a.m. and work until 10:00 p.m., and other times, he could work up to 11.00 p.m.

### **The 3<sup>rd</sup> Claimant's Case**

20. The 3<sup>rd</sup> Claimant stated that through an oral contract, the Respondent employed him as an inspector for his public Transport Motor Vehicle from 3<sup>rd</sup> January 2002, at a consolidated salary of Kshs 6000 per month. He continued to earn this salary for all those years he was in the service of the Respondent.
21. The Claimant contended that the salary was way below the minimum wage of Kshs 13,614.44 which was applicable at the material times.
22. He worked diligently for the Respondent until 1<sup>st</sup> October 2013, when the latter instructed him not to report to work the following day thereby terminating his employment unfairly.
23. He sought for the intervention of his Union. However, this did not yield fruit as the Respondent refused to respond to the Union's letters.



24. During his service, he could work from 5.00 a.m. to 10.00 p.m. or 11.00 p.m. daily.
25. Cross-examined by Counsel for the Respondent, the 3<sup>rd</sup> Claimant reiterated that he was not employed under any written contract and that his salary remained at Kshs 6000 throughout his tenure of service.
26. As an inspector, he was charged with the responsibility of carrying out inspections in the Respondent's motor vehicles, to confirm that all passengers were issued with fare payment receipts.
27. The Respondent had three inspections. At some point, there was no work. As a result, he and his colleagues were asked to be off duty. Later, his colleagues were called back to work. He was not.

### **The Respondent's Case**

28. The 1<sup>st</sup> Respondent Julius Sammy Katuma testified on 29<sup>th</sup> May 2023 and 24<sup>th</sup> July 2023. He adopted his witness statements filed herein as his evidence in chief and tendered the documents the documents filed herein contemporaneously with the responses to the Claimant's claims, as his documentary evidence.
29. On the 1<sup>st</sup> Claimant's case, the 1<sup>st</sup> Respondent stated that the 2<sup>nd</sup> Respondent is a corporate body duly registered under the *Companies Act* Cap 486 Laws of Kenya. The company was incorporated in 2009, and commenced business in the public transport sector, after registration. The Claimant didn't therefore work for the 2<sup>nd</sup> Respondent for the length of time alleged.
30. On or about 2013, the 1<sup>st</sup> Claimant sought for the employment of the 2<sup>nd</sup> Respondent.
31. In September 2013 after taking the motor vehicle assigned to him for gearbox repairs, the Claimant abandoned the said motor vehicle at the garage never to report back. The 2<sup>nd</sup> Respondent was left with no option but to engage another person in his place. Thus, his employment wasn't terminated by any of the Respondents, he left employment at his own volition without notice.
32. By reason of these premises the Claimant's claim on unfair termination and for overtime, off-duty days, underpayment compensation, and severance pay is unfounded.
33. He stated that the 2<sup>nd</sup> Claimant, Zacharia Kimeu Kisanzu, was an employee of the 2<sup>nd</sup> Respondent as a driver, too.
34. The Claimant was 1<sup>st</sup> to serve under a probationary contract before being confirmed into employment. However, before he could complete his probationary period, he absconded duty. After desertion, the 2<sup>nd</sup> Respondent was forced to employ another driver. Therefore, the Claimant's whole claim is without merit.
35. The 2<sup>nd</sup> Respondent was incorporated by him and another director (now deceased).
36. The 1<sup>st</sup> Respondent contended that the 3<sup>rd</sup> Claimant is his nephew. His father and the 1<sup>st</sup> Respondent's wife are siblings. The Claimant regularly visited his aunt. During such visits, he could be left to man a shop that the 1<sup>st</sup> Respondent and his wife were operating in Lema area in Machakos County.
37. The Claimant was not at any time employed as an inspector, as he claims. Therefore, he was not earning a salary of Kshs 6000 per month as he alleges.
38. The 3<sup>rd</sup> Claimant's claim is therefore without merit.
39. Cross-examined by Counsel for the Claimants, the 1<sup>st</sup> Respondent testified that the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were driving his motor vehicles with his authority. The engagement between him and the two was verbal. Each of them had a vehicle to drive.



40. He testified that they could receive their salaries daily, in cash. However, they weren't signing for the cash received. At all material times, he didn't keep a record of his drivers and inspectors.
41. He further testified that he never received any letter from the Claimant's union. He was never called to attend the labour offices. The labour officer did not write him any letter.
42. He reiterated that the 3<sup>rd</sup> Claimant was not his employee but only a relative. In his business, he did not have vehicle inspectors.
43. After the 1<sup>st</sup> and 2<sup>nd</sup> Claimants absconded duty, he did not report the matter to the labour officer or issue them with any show cause letter.
44. His drivers did not have any specific time for reporting to and leaving work. They could sometimes retire from work at 1.00 p.m.
45. The Claimants (1<sup>st</sup> and 2<sup>nd</sup>) did not proceed with their leave at any time.

### **Analysis and Determination**

46. I have carefully considered the pleadings, the evidence by the parties and submissions, and distil the following issues for determination:
  - a. Whether the Claimants' respective claims against the Respondent are time-barred.
  - b. Whether the Claimants were at all material times employees of the Respondents.
  - c. Whether the Claimants are entitled to the reliefs sought.

### **Whether the Claimants' respective claims against the Respondent are time barred.**

47. Limitation of actions is a jurisdictional matter. It can be raised by the parties, or the court *suo moto*. Section 89 of the [Employment Act](#) provides:

“Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#), 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.”

48. This court notes that in paragraph 3 of his statement of claim, the 1<sup>st</sup> Claimant pleaded that his employment was determined on 10<sup>th</sup> October 2013. In a departure from this pleaded fact, he stated in his witness statement herein filed contemporaneously with the statement of claim, that:

“.....on 1<sup>st</sup> October 2013 at 10.00 a.m. during the pay he told me not to report to work the next day. He refused to tell why, despite my asking .....”

49. Unarguably, the 1<sup>st</sup> Claimant's statement of claim was filed on 10<sup>th</sup> November 2016. So, whether the termination occurred on 10<sup>th</sup> October 2011 or 1<sup>st</sup> October 2013, it is not difficult to conclude that the claim was filed outside the three years, rendering it time-barred by dint of Section 89 of the [Employment Act](#).
50. The position equally applies to the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants. They maintained as the 1<sup>st</sup> Claimant did, the date of termination in their respective statements of claim, as 10<sup>th</sup> October 2013, and 1<sup>st</sup> October 2013, in their witness statements.



51. By reason of the foregoing premises, I find that the Claimants' claim for unfair termination was time-barred. Any reliefs sought by the claimants based on the claim are hereby rejected. Resultantly, the claim is struck out.
52. Sometimes reliefs are sought independent of the claim for unfair termination. Such are always considerable by the court, notwithstanding the fact that the claim for unfair termination, has been struck out for one reason or the other.

### **Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Claimants were employees of the Respondents**

53. This court notes that throughout his pleadings, the 1<sup>st</sup> Respondent drove the narrative that the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were employees of the 2<sup>nd</sup> Respondent and that the 3<sup>rd</sup> Claimant wasn't either his or the 2<sup>nd</sup> Respondent's at any given time. However, in his evidence under cross-examination he made an admission on this vital fact, the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were his employees. On this premise, I find that at the material time, the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were employees of the 1<sup>st</sup> Respondent.
54. The 3<sup>rd</sup> Claimant boldly asserted that he was an employee of the Respondents at all material times, without placing forth any evidence from which the assertion could be established. Further considering that the 2<sup>nd</sup> Respondent was incorporated in 2013, he needed to come out clearly on why he sued it; who specifically was his employer; the relationship between the 2<sup>nd</sup> Respondent and him that could be the basis for him impleading the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent. With these unexplained pivotal aspects of his case, the 3<sup>rd</sup> Claimant left himself to appear as a person playing a lottery with the court process. In this circumstance, the only possible and reasonable conclusion that can be made and is hereby made is that the Claimant did not demonstrate that he was an employee of either the 1<sup>st</sup> or the 2<sup>nd</sup> Respondent. His claim against them collapses at this hurdle.

### **Whether the Claimants are entitled to the reliefs sought**

55. I now turn to consider the 1<sup>st</sup> and 2<sup>nd</sup> Claimants' entitlement to the reliefs sought. Having found as I have hereinabove, that the Claimants' claim for unfair termination was filed out of time, thus time-barred, an effect trickles down to some of the reliefs sought. Those anchored on the claim [unfair termination] aren't grantable. For this reason, the Claimants' claim for; notice pay and compensation for unfair termination is declined.
56. The Claimants claimed for "unpaid Safari allowances". The court notes, that from the material placed forth by them, not a portion of it spoke to this relief sought. As a result, it is rejected for want of basis and evidence.
57. That claims for "off duties and public holidays" also should suffer the same fate. They were just thrown to court and hope held that somehow the court would award the same. In my view, this is not the best way of presenting one's case. A relief sought can only be secured by the presentation of sufficient evidence. This, the Claimants did not do.
58. The Claimants further sought gratuity (service pay) against the Respondents. It is pertinent to state that the benefit of gratuity is different from service pay, the two words cannot be used interchangeably. Gratuity is a contractual benefit, only available to an employee where it is provided for by the employment contract, while service pay is a statutory benefit grantable under Section 35 of the [Employment Act](#).



59. The computational formula for the two is often different. Therefore, Claimants needed to be clear on which of the two benefits, in their holding could rightfully be availed to them. As this Court cannot get into the realm of speculation, the claim under this head is rejected.
60. Further, it is a claim that cannot be sustained as it was filed outside the statutory period set out in Section 89 of the *Employment Act*.
61. The Claimants contended that at all material times, the Respondent paid them below the set minimum wages under the relevant Wage orders. Section 48 of the *Labour Institutions Act*, 2007 provides a platform for any employee who holds that his/her employer has underpaid him or her, to file for recovery of the difference between the amount that he or she could have actually earned had the employer adhered to the minimum wages, set out by the relevant Wage orders, and what he earned. In my view, the relevant minimum wages are never static, they change from time to time to reflect the obtaining economic realities within society.
62. For a claim under section 48 of the *Labour Institutions Act* to succeed, the Claimant must first demonstrate that the Wage Orders for the material time(s) applied to him or her and that the employer did for a particular time pay him below the minimum wages postulated in the Wage Orders. Where the alleged underpayment is alleged to have been for a long time, as is alleged in the instant matter, it becomes imperative for the Claimant to correctly identify the relevant Wage Orders that were applicable for various periods within that time, and the minimum wages they set. I know that within the approximately 10 years that Claimants have successfully convinced the court, to be their length of service for the Respondent, several Wage Orders were applicable for different periods with different minimum wages. The Claimants cannot be allowed to misleadingly purport that there was only one.
63. In this matter, the Claimants were reasonably expected to identify the various relevant Orders and the minimum wages they did set and connect them to their case. They failed to do this. They gave their claim an incorrect approach. The claim fails on this account.
64. Lastly, the Claimants contended that for the entire time they were under the employment of the Respondent, the 1<sup>st</sup> Respondent did not allow them to proceed for annual leave. In his evidence under cross-examination, the 1<sup>st</sup> Respondent admitted that he did not allow them to. Annual leave is a statutory right under section 28 of the *Employment Act*, for employees. Inarguably, a corresponding duty is created on the employer, to allow enjoyment of the right. Where the employee hasn't been allowed to enjoy the right, compensation in lieu should be suffered by the employer.
65. Where the employee is not allowed to enjoy the right for a long time, a cause of action flows from the denial from month to month, and as such, the cause of action takes the character of a continuous injury as contemplated under Section 89 of the *Employment Act* 2007. It is pursuant to the doctrine, of continuous injury, that I find the 1<sup>st</sup> Claimant entitled to compensation for earned but untaken leave for 10 years, Kshs 75,600, and the 2<sup>nd</sup> Respondent Kshs 91,000.
66. As the Claimants' claim failed substantially each party shall bear its costs.
67. In the upshot, judgment is hereby entered for the 1<sup>st</sup> and 2<sup>nd</sup> Claimants for:
- a. Compensation for earned but untaken leave days, Kshs 75,600/- and Kshs 91,000/- respectively.
  - b. Interest at court rates from the date of this judgment till full payment.
  - c. Each party is to bear its costs.



**READ, DELIVERED AND SIGNED THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**OCHARO KEBIRA.**

**JUDGE**

In Presence of:

Ms. Kitagai holding brief for Rakoro for Claimant

Ms. Wadegu for the Respondent.

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 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.

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**OCHARO KEBIRA**

**JUDGE**

