



REPUBLIC OF KENYA



Kenya Petroleum Oil Workers Union v Birgis Service Station (t/a Total Nyamasaria Service Station (Cause E073 of 2021) [2024] KEELRC 2475 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2475 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E073 OF 2021
CN BAARI, J
OCTOBER 11, 2024**

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION CLAIMANT

AND

BIRGIS SERVICE STATION (T/A TOTAL NYAMASARIA SERVICE STATION RESPONDENT

JUDGMENT

1. In a Memorandum of Claim dated 15th October 2021 and filed in court on 26th October, 2021 the Claimant brought this action on behalf of the grievant one Mr Robert Otieno Simba, seeking a total sum of Kshs 535,518/= broken down as follows: -
 - i. Salary underpayments of Kshs 398,039/=
 - ii. Accrued leave days of Kshs 48,933/=
 - iii. Public Holiday arrears of Kshs 51, 264/=
 - iv. Unpaid salary for 18 days worked in December, 2019 -Kshs 13,981/=
 - v. 2 years' service pay of Kshs 23,301/=
2. In a response dated 5th April 2024, the Respondent averred that the Claimant had engaged in theft and absconded duty, hence he was not entitled to the orders sought.
3. The matter proceeded for hearing on 10th June, 2024 with the Claimant and one Kennedy Odhiambo, a mechanic at the Respondent's company testifying in support of their respective cases.
4. Both parties filed written submissions on the matter.



The Claimant's Case

5. The Claimant avers that it is a registered trade union authorised to represent its member, Mr Richard Otieno Simba (hereinafter known as the grievant). It states that the grievant was employed by the Respondent in June, 2014, where he worked until 8th January 2020 when he resigned from service on medical grounds.
6. It is its case that following the resignation and upon receiving a request for representation from the grievant, the Claimant asserts that it requested to have a meeting with the Respondent, which meeting never materialized. The Claimant contends that it subsequently reported the dispute to the minister, who appointed a conciliator.
7. The Claimant's case is that conciliation did not bear fruit and the conciliator's findings were not challenged.
8. It is the Claimant's assertion that the grievant was first appointed in June, 2014 on a salary of Kshs 3,500, which was later revised upward to Kshs 7,500, and subsequently to Kshs 9,000. The Claimant avers that these amounts were well below the minimum wage.
9. Additionally, the Claimant affirms that the grievant was not compensated for 63 days of accrued leave, 18 days worked in December 2019, and 33 public holidays.
10. It is their prayer that the court allows the reliefs in their statement of claim.

The Respondent's Case

11. The Respondent asserts that it always had a good working relationship with the grievant until sometime in 2019, when it began receiving complaints from customers regarding theft by the grievant. The Respondent further states that in September, 2019, the grievant deserted duty without notice, and that it is only after locating him did they realize that he had been involved in an accident and they allowed him to remain at home until he recovered.
12. The Respondent avows that after resuming duty in November, 2019 for 3 weeks, the grievant absconded again for 1 month, and later handed in his resignation on 8th January 2020. It asserts that the grievant did not allow for any discussions before his resignation.
13. Regarding conciliation, the Respondent affirms that it was always willing to engage in the process, but that their efforts were thwarted by the Covid.19 pandemic that prevented a physical meeting. Additionally, the Respondent's case is that it requested for a virtual meeting which request was declined.
14. Overall, it is the Respondent's case that it has complied with the labour laws and prays that the Claimant's case be dismissed with costs.

The Claimant's Submissions

15. The Claimant submits that the grievant was involved in an accident on 19th December 2019, rendering him unable to continue serving as a pump attendant. It argues that Respondent has not proven desertion in any manner.



16. The Claimant avows that no evidence has been presented to show that the Respondent made efforts to trace the grievant. The Claimant cites a number of authorities among them *Simon Mbiti Mbane v Inter Security Services Ltd* [2018] eKLR for the holding that: -

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate the efforts made to contact such an employee without success.”
17. It is the Claimant’s submission that there was no evidence in terms of police reports to prove theft by the grievant.
18. It is the Claimant’s further submission that the Respondent refused to take part in the conciliation process.
19. On the claim for underpayment, the Claimant argues that the grievant, as a vehicle service worker within Kisumu City, was supposed to be paid Kshs 12,654 from June 2014 to April 2015. Additionally, from June 2014 to April 2015, he should have been paid Kshs 14,553, from May 2015 to April 2017 Kshs 16,299, from May 2017 to April 2018 Kshs 19,233.46, and from May 2018 to November 2018 Kshs 20,195.15, all amounting to Kshs 638,054.36.
20. Concerning accrued leave days, the Claimant submits that the grievant never utilised his leave days, nor did the Respondent provide evidence that the grievant went on leave. The Claimant submits that the grievant is entitled to the amount sought as he never proceeded on leave from June 2014 to December 2019.
21. In support of the amount due for public holidays, the Claimant submits that no evidence has been produced by the Respondent as provided under Section 74 of the *Employment Act*.
22. Regarding service pay, the Claimant submits that the grievant was not registered under any pension scheme. It avers that the grievant is entitled to service pay for the two years worked. It cites Section 35 (5) of the *Employment Act*.
23. On the certificate of service, the Claimant avows that the grievant is entitled to the same on the strength of Section 51 of the *Employment Act*.

The Respondent’s Submissions

24. It is the Respondent submission that the claim for underpayment and accrued leave days are statute-barred having been filed more than one year after resignation. It cites Section 90 of the *Employment Act* on claims based on continuing injuries being brought within twelve months of cessation thereof. It is their submission that given that the grievant resigned on 9th January 2020, and filed suit on 26th October 2021, 1 year and 10 months later—these claims qualify as continuous injuries and are therefore time-barred. The Respondent cites *Cotec Security Group Limited v Kenya Private Security Workers Union* on cessation meaning the date in which the employment relationship came to an end.
25. The Respondent submits that the conciliation process did not stop the statute of limitations from running, and thus cannot be used to justify the claims for underpayment and accrued leave. It cites the Court of Appeal in *Rift Valley Railways (Kenya) Ltd vs Hawkins Wagunza Musonye & Another* [2016] eKLR which addressed limitation of time in employment matters in the following terms:-

“Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent on the respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations...Where a statute limits



time for bringing an action, no court has the power to extend that time unless the statute itself allows the extension of time.”

26. In further impugning the conciliation process, the Respondent submits that despite a conciliator being appointed on 11th June, 2020, the grievant did not produce any minutes, invitation for conciliation, extension of prescribed timelines or anything to guide the court in understanding what transpired during conciliation.
27. The Respondent submits that after the Claimant’s letter of 25th January 2021 in which it was expressed that a physical meeting was not feasible due to the Covid 19 pandemic, and the grievant’s age, no further steps were taken to advance the conciliation. The Respondent asserts further that the Conciliator’s letter of 21st January 2021, stating that his timelines have been exhausted without an agreement, was written outside of the 30 day period prescribed under Section 67 of the [Labour Relations Act](#).
28. Regarding desertion of duties, the Respondent submits that the Claimant has not provided proof that he requested for off days, sick off and/or informed the Respondent of his accident.
29. In respect of public holidays, the Respondent submits that the Claimant did not provide evidence that he worked during those public holidays.
30. On the claim for payment for the 18 days worked in December, 2019, the Respondent submits that the Claimant should have given a notice of 28 days as provided for by Sections 35(1)(c) and 36 of the [Employment Act](#). Having provided only 1 days’ notice, the Respondent submits that it is the grievant who should pay a months’ salary.
31. In respect of service pay, the Respondent argues that due to the illegal manner of the grievant’s resignation he is not entitled to the same.
32. On costs, the Respondent stakes his claim on account of the Claimant’s failure to prove his case on a balance of probabilities.

Analysis and Determination

33. After careful analysis of the pleadings, the evidence adduced, the witnesses’ testimony and submissions, the sole issue for determination is whether the Claimant is entitled to the prayers sought.

Whether the Claimant is entitled to the prayers sought.

34. At the outset it is important to note that the claim herein was primarily for underpayments and terminal dues. However, in the submissions, parties strayed into issues such as desertion and theft by servant which was not material to the prayers sought in the Memorandum of Claim, as the grievant admitted resigning from the service of the Respondent, hence desertion is neither here nor there.
35. I will therefore proceed to address each aspect of the reliefs sought and render myself accordingly.

Underpayments

36. The Claimant sought an order for payment of Kshs 398,039/= in underpayments. On its part the Respondent contended that the underpayment sought was a continuing injury, hence was time barred by dint of Section 90 of the [Employment Act](#).



37. Section 90 of the *Employment Act* provides thus on time limitation:-

“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. “

38. The import of this section is that any claim based on a continuing injury must be brought within 12 months of cessation of the violation. In the case of *Arisa v Kipkebe Limited* (Employment and Labour Relations Cause E005 of 2023) [2024] KEELRC 1232 (KLR) (23 May 2024) (Judgment) a continuing wrong was described as a single wrongful act which causes a continuing injury.

39. Further, the Supreme Court of India in *Balakrishna S.P. Wagbmare v Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798 explained the concept of continuing wrong (in the context of the *Indian Limitation Act*) as follows:-

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

40. The *Employment Act* does not define continuing injury. The *Black's Law Dictionary* Tenth Edition, however defines continuing injury thus:-

“An injury that is still in the process of being committed.”

41. Salary underpayment as claimed by the Claimant was a monthly occurrence as the grievant's evidence was that he was underpaid each month since his employment by the Respondent.

42. In my view, the underpayment fits well within the definition of continuing injury which goes to say that the claim for the underpayment ought to have been lodged within 12 months from the date the Claimant's resignation from the service of the Respondent.

43. The grievant resigned from the service of the Respondent on 8th January, 2020, while this suit was instituted on 26th October, 2021. This period between resignation and filing of the claim is by simple arithmetic more than a year.

44. In light of the foregoing, the claim for underpayment is statute barred. It thus fails, and is dismissed.

Accrued Leave Days.

45. The Respondent as the employer was under obligation to either show that the grievant utilized his leave days or that it paid him for the leave days not taken as at the time of resignation. This the Respondent did not do.

46. The Respondent's assertion that leave is a continuing injury, does not in my view hold, on the premise that leave is annual and is thus a terminal due owed to an employee at the time of separation.



47. I thus find and hold that the grievant is entitled to pay for leave not taken, and which is hereby awarded as prayed in the sum of Kshs 48,933/=.

Public Holidays

48. The Claimant averred that the amount sought under this head was not controverted by the Respondent. Additionally, it contended that the Respondent failed to avail employment records as required by Section 74 of the *Employment Act*. On its part the Respondent stated that the specific public holidays were not identified nor did the Claimant produce any document showing that the grievant worked during public holidays.

49. As it stands, the claim for holidays remain mere assertions. Nothing has been produced to show that the grievant worked during holidays. Furthermore, the Claimant did not issue a notice to produce to the Respondent requiring him to produce records under Section 74 of the *Employment Act*.

50. The claim is therefore unproven and it fails.

Unpaid Salary

51. The grievant claimed to have worked for 18 days in December 2019 and for which he was not compensated. On its part the Respondent avers that the grievant is not entitled to this amount given that he issued a short notice of 1 day as opposed to 28 days stipulated under Section 35 (1) (c) of the *Employment Act*.

52. The Respondent also cites Section 36 of the *Employment Act* and avers that the grievant should pay them a month's salary in lieu of notice.

53. Section 35 (1) (c) of the *Employment Act*, provides that a contract of service is deemed terminated by either party at the end of twenty-eight days after issuance of written notice. Section 36 further obligates a party who terminates a contract under Section 35 (5) to pay the other party for the duration of the notice period.

54. In the circumstances of this case, although it is clear that the resignation notice was shorter than stipulated by law, the Respondent cannot off set the amount of the unpaid salary with the pay in lieu of notice, as there was no counter-claim for the amount of the notice period.

55. In the circumstances, and the Respondent not having denied owing the grievant on account of unpaid salary, the claim is found to have merit and the amount of unpaid salary being 18 days salary is allowed as prayed.

Service Pay

56. The Respondent has not led any evidence to show that the grievant was enrolled in any pension scheme or even NSSF. The claim for payment of service pay is thus merited and is awarded as prayed.

Conclusion

57. In the end, the claim succeeds and orders granted in favour of the Claimant as follows: -

- a. Pay for accrued leave days at Kshs 48,933/=
- b. Service pay at Kshs Kshs 23,301/=
- c. Unpaid salary for 18 days worked in December, 2019 -Kshs 13,981/=



d. Costs of the suit shall be borne by the Respondent.

58. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
11TH DAY OF OCTOBER, 2024.**

C. N. BAARI

JUDGE

Appearance:

Ms. Achieng h/b for Mr. Onyony for the Claimant

Ms. Imbaya present for the Respondent

Mr. Kirui - C/A

