



**KUDHEIHA Workers Union Dika Shunu Dawa v Diani Marine Limited & another
(Cause E037 of 2024) [2025] KEELRC 1235 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E037 OF 2024**

**M MBARŪ, J
APRIL 30, 2025**

BETWEEN

KUDHEIHA WORKERS UNION DIKA SHUNU DAWA CLAIMANT

AND

DIANI MARINE LIMITED 1ST RESPONDENT

THOMAS SOLLACHER 2ND RESPONDENT

JUDGMENT

1. The claimant filed the claim on behalf of the grievant, Dika Shunu Dawa. The 1st respondent is a limited liability company. The 2nd respondent is the owner and manager of the 1st respondent.
2. The claim is that the respondents employed the grievant as a security guard for 20 years and served under a 6-month back-to-back contract. At the time of his retirement, the grievant was earning Ksh. 12,000 per month and worked for not less than 14 hours per day.
3. The claim is that the respondent gave the grievant a 3-month retirement notice through a letter dated 14 July 2022, effective 13 October 2022. On 25 October 2022, the claimant wrote to the respondent for payment of terminal dues without a response.
4. On 7 November 2022, the claimant issued a reminder letter for the full payment of retirement dues without a response. On 25 January 2023, the Minister was informed of a dispute in which the respondent proposed to pay Ksh 20,000, and the parties reached a stalemate. The matter was not resolved.
5. The claim is that the respondent is in breach of the law for failing to pay the grievant his lawful retirement dues in violation of Section 35(5) of the *Employment Act* (the Act) section 5(4) of the Act read with Section 48(a) and (b) of the *Labour Institutions Act*. Failing to provide for an off/rest day



violated Section 27 of the Act. There was no provision of housing or payment of a house allowance contrary to section 31 of the Act. Public holidays were not compensated.

The claim is for;

- a. Service pay for 20 years worked Ksh 314,452;
 - b. Salary underpayments for 36 months, ksh 134,013.60;
 - c. Overtime of 4 hours each day Ksh.521,164.80;
 - d. Unpaid house allowance for 36 months Ksh. 84,902.04;
 - e. 33 Public holidays Ksh. 34,589.28;
 - f. Leave travelling allowances for 3 years, Ksh.16,800;
 - g. Annual leave for 3 years, Ksh.45,156;
 - h. Costs of the suit.
6. The grievant testified in support of his case that he worked diligently for the respondent until his retirement at 55 years old. He was not paid his terminal dues from underpayments, service, overtime work, house allowances, public holidays, leave, or travelling allowance. As a member of the claimant, he reported the matter, and the claimant lodged a dispute with the Minister. The respondent attended and offered to pay Ksh. 20,000 in settlement, which was not sufficient for terminal dues.
 7. In response, the respondents denied the claims and stated that there was no employment relationship between the grievant and the 2nd respondent; hence, the court had no jurisdiction.
 8. the grievant was fully paid his salary and dues and duly acknowledged by appending his signature, discharging the 1st Respondent from any future claims by the grievant, and as a result, the suit herein is malicious and in bad faith.
 9. The grievant was employed as a casual employee on a contractual basis and is therefore not entitled to the relief sought. The claim should be dismissed with costs.
 10. No evidence was called. The respondents remained absent during the hearing upon taking the date by consent.
 11. The findings analyses and address the pleadings, evidence, and submissions filed by the claimant.
 12. It is a common cause that the grievant retired from his employment with the respondents on 13 October 2022.
 13. It is also not contested that the grievant was serving under a six-month term contract, each running back to back for 20 years.
 14. Upon retirement, the grievant was paid his dues and a discharge voucher was executed.
 15. A fixed-term contract is lawful and legitimate. It runs on its terms and conditions and requires no notice or reasons for termination. However, in this case, the respondents issued the grievant with his retirement notice, which is not contested.
 16. Any claim arising out of the fixed-term contract(s) is addressed under section 89 of the *Employment Act* (the Act). It must be addressed within 3 years from the date that the act complained of accrued. Where there was a continuing injury occurring daily, weekly, or monthly, such matter should have



been addressed within 12 months from the date of cessation, as held in *Kenya Railways Corporation v Ododa & 216 others* [2024] KECA 1620 (KLR).

17. In this regard, each claim should be addressed based on section 89 of the Act.
18. The respondents raised the question of the discharge voucher executed by the grievant removing liability for any other future claims. However, under Section 35(4) of the Act, unlike commercial disputes, an employee is allowed to address the lawfulness or the unfair termination of his employment, including the non-payment of lawful terminal dues. In this regard, by addressing each claim, where lawfully due, the discharge voucher cannot be applied to negate the law.
19. On the claim for service pay, such is due under section 35(5) of the Act where the employer fails to deduct and remit statutory dues. The claimant has not filed any CBA between the union and the respondent. The claimant filed the claim and attached various payment vouchers, which indicate a basic pay of Ksh. 12,000, payment for NSSF, and NHIF.
20. However, Regulation 17 of the Regulation of Wages [Protective Security Services] Order 1998, applied to the grievant's employment. He was a Security Guard. For the contracts going back to 3 years, section 89 of the Act applied, he was entitled to a gratuity pay at the rate of 15 days for each full year worked as held in *Kibiru v Mars Security Guards (Cause 1951 of 2016)* [2025] KEELRC 184 (KLR) (31 January 2025) (Judgment)
21. At the wage of Ksh.12, 000, a service/gratuity of Ksh.36, 000 is due under the Wage Orders.
On the evidence presented, service pay is not due.
22. On the claim for salary underpayments for 36 years, the grievant testified that he was employed as a security guard and his last wage was Ksh.12, 000 per month. He was working in Diani, Kwale County.
23. Under the Wage Orders applicable in October 2022, a security guard minimum wage was Ksh.8, 109.90 basic wage. The applicable house allowance of 15% at Ksh.1, 216.45 gross pay ksh. 9,326.35.
24. There was no underpayment, and the wage paid assessed was inclusive of a house allowance. To seek more than the allocated wage would be unjust enrichment.
25. On the claim for overtime, leave days and rest days, The Regulation of Wages [Protective Security Services] Order, 1998 makes provision for hours of work, overtime, weekly rest, and public holidays work in the industry. An Employee claiming under these provisions has an evidential burden of establishing that, his Employer acted in breach of the provisions. It is not enough to point to a provision of the law, without establishing facts to which these legal provisions apply.
26. The grievant testified that he worked for over 14 hours each day without compensation. He was not allowed a rest day and during public holidays, he remained at work.
27. Overtime work is a continuing injury. Where the employee undertakes such duty without stoppage or compensation, the accrued overtime must be claimed within 12 months from the date to cessation. In this regard, the fixed-term contracts considered, the grievant can only seek under the last contracts going back to one year.
28. The respondents did not file any work schedules for the grievant as required under Section 10(6) and (7) read with Section 74 of the Act. On the evidence of the grievant, for overtime work each day, the wage of Ksh.12, 000 per month he had $Ksh.50 \times 4 \times 365 = Ksh.73, 000$ in overtime.
29. On the claim for 33 public holidays, the claimant has made a general claim without giving the particulars of which public holidays. The burden placed upon the claimant is not discharged.



30. On the claim for accrued leave days for 3 years, this is a right under Section 28 of the Act. However, such leave should not accumulate for over 18 months under Section 28(4) of the Act. The Respondents did not file any records of the annual leave taken by the grievant. On the claim, the grievant is only entitled to 33 leave days all at ksh. 13,200.
31. The claim for leave travelling allowance is not supported by any evidence and the contract did not provide for this benefit.
32. On claimed costs, the claimant made effort to report the dispute to the Minister but there was no resolution leading to these proceedings. The claim, as analyzed above, the respondents shall pay the cost assessed at ksh.50, 000.
33. Accordingly, judgment is entered for the claimant against the respondents in the following terms;
 - a. The grievant is entitled to the following terminal dues;
 - i. Service/gratuity Ksh.36,000;
 - ii. Leave pay Ksh.13,200;
 - iii. Overtime pay ksh.73,000;
 - b. Costs Ksh. 50,000.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF APRIL 2025

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

