



Maina (Suing on Behalf of Flora Ambasa Auko - Deceased) v Limoro Kenya Limited (Employment and Labour Relations Cause E114 of 2017) [2025] KEELRC 1371 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1371 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E114 OF 2017**

JW KELI, J

MAY 9, 2025

BETWEEN

JOSEPH SAYI MAINA (SUING ON BEHALF OF FLORA AMBASA AUKO - DECEASED) CLAIMANT

AND

LIMORO KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant was the brother of the deceased and obtained letters of administration following the demise of the employee Flora Ambasa Auko aka Ruth Ambasa Auko, and amended the statement of claim dated 13th June 2017 on the 9th January 2023 to substitute the deceased and the respondents. The claimant sought the following reliefs:-
 - a. A declaration that the termination of the claimant was illegal and unlawful
 - b. The respondent to pay the claimant an amount of Kshs. 3,737,603.00
 - c. The respondent to pay the claimant compensation of Kshs. 151,200.00
 - d. Costs of the suit
 - e. Interest on ii, iii and iv.
2. The claimant filed together with the claim, verifying affidavit sworn on the 9th January 2023 and his witness statement on even date. The claimant relied on the documents filed together with the claim on the 16th June 2017. The claimant further filed a bundle of documents on the 20th December 2019.
3. The claim was opposed. The respondent filed its memorandum of reply dated 14th July 2017 together with list of documents and the bundle, and the respondent's witness statement of Samuel Njugunna Kamau of even date. On the 14th February 2020 the respondent filed bundle of documents being notice



of lateness to work dated 9th February 2015, approval of leave days of the deceased employee and its certificate of incorporation dated 31st October 2008. The respondent filed a further list of documents dated 19th November 2021 related to payment of gratuity of Kshs. 80,000 released to the daughter of the deceased by the Labour office.

Hearing and evidence

4. The claimant's case was heard on the 3rd February 2025 where Joseph Sayi Maina was the only witness of fact and testified on oath. He relied on his witness statement filed together with the amended claim. He stated that the sister/employee passed on while the case was pending and having obtained a grant adlitem he was now the claimant. He produced all documents filed by the claimant as outlined above. He was cross-examined by counsel for the respondent, Mr. Ng'ang'a and re-examined by his advocate.
5. The respondent's case was heard on even date. Samuel Njuguna Kamau was only witness of fact and testified on oath. He adopted his witness statement sworn on the 14th July 2017 as his evidence in chief and produced documents filed on even date of the statement and the list of documents dated 19th November 2021. He was cross-examined by counsel for the claimant, Mr. Khalwale and re-examined by his advocate.
6. The parties filed written submissions after close of the respondent's case.

Determination

Issues for determination

7. The court having considered the dispute and written submissions by the parties, was of the considered opinion that the issues placed by the parties before the court for determination were as follows:-
 1. Whether the termination was fair
 2. Whether the claimant was entitled to reliefs sought

Whether the termination was fair

8. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR.
9. The claimant pleaded her employment was terminated without a warning or hearing. She stated that her belongings were thrown out of the residence of employer and produced photographs. The respondent denied the assertion and in paragraph 5(4) of the Respondent's memorandum of reply dated 14th July 2017 stated that the claimant chose to leave her employment with respondent on her



own volition. In the witness statement of Samuel Njuguna Kamau he stated that the claimant left on own volition and removed her things from their estate, stating she wanted to go and find a better job.

10. During cross-examination by counsel for the respondent, it was put to the claimant(estate administrator) that the Respondent’s position was that the deceased went on leave on 9th May 2016 and never returned to work. The claimant responded that she was dismissed. Further, the respondent advanced that the deceased at 51 years could have rested from work of which the claimant responded she was dismissed.
11. The court noted that the parties were before the conciliator on the dispute of wrongful termination and the employer to settle the dispute, paid Kshs. 80,000 monies released to the deceased’s daughter by the Labour Office. The court did not believe the claimant left work on own volition. The court believed the deceased employment was terminated and her belongings thrown out of the estate by the employer probably after failing to return to work after the leave or for other reason only known by the employer. On a balance of probability the court finds that the deceased employee was terminated unfairly and further even if she left for leave on 9th May 2016 and failed to return as stated by RW, the obligation was on the employer to bring the employment relationship to an end in accordance with the provisions of section 41 of the Employment Act by issuance of notice of intention to terminate the employment for failure to return to work. That was not the case.
12. The court declares that the termination was both substantially unfair for lack of valid reasons and procedurally unfair for lack of hearing before termination under section 41 of the Employment Act to wit:-
(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

Whether the reliefs sought by the claimant were merited.

13. On reliefs sought of overtime, underpayment and unpaid leave the same relate to backpay during employment hence fall under category of continuing injury and ought to be filed within 12 months of cessation the claimant having pleaded termination in 9th June 2016 as per the employee(Ruth Ambasa Auko witness statement of 8th February 2017 filed on 16th June 2017. The claim was initially filed on 16th June 2017 hence the continuing injury claims were outside the 12 months. In John Kiiru Njiiri v University of Nairobi [2021] eKLR the court held, ‘Equally in this case, upon cessation of employment on 12th July, 2016 any claims arising out of employment and relating to unpaid leave days commuted, such ought to have been addressed within 12 months as otherwise, these claims are time barred.’”The issue of continuing injury is now settled by the Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- “There is no contest that a claim premised on a continuing injury must be filed with 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 & 468 Others [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 at 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.” The Court adopted with approval the elaborate definition of continuing injury claims in *M. R. Gupta v Union of India*, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of “continuing wrong” and “recurring wrongs” and reversed the decision. It held: “The appellant’s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant’s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant’s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....”

14. Consequently, the claim having been filed on the 16th June 2017, which date was outside 12 months post termination of 9th June 2016, the claims for overtime, underpayment and untaken leave were time-barred under section 89 of the *Employment Act* (as amended in 2014) to wit: ‘89. Limitations

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.”

15. The court took notice of payment of terminal benefits of Kshs. 80,000 to the daughter of the deceased. The Respondent produced documents as evidence of the payment under list dated 19th November 2021 being KCB payment slip of Kshs. 80000 and the Ministry of Labour register for gratuity payments showing cheque No. 005889 as received by Julian Awinja Aoko on 7th March 2019. The payment was acknowledged by the claimant (estate administrator of the deceased employee) hence in consideration of the reliefs the payment will be factored.
16. Notice pay – the claimant had pleaded 2 months notice pay for Kshs 21819 and stated it was confirmed by interested party on 13th June 2016. When the claimant amended the claim, he stated the notice was for one month. The court having held the termination was procedurally unfair the claimant was entitled to one-month notice pay under the *Employment Act*. Though the late employee was under a union the terms of the Collective Bargaining Agreement were not disclosed by the production of



the agreement in court. The court finds the claimant was entitled to notice pay of one month's notice under section 35 of the Employment Act of Minimum Wage pleaded of Kshs. 12600.

Claim for gratuity for years worked.

17. There was no evidence of payment of NSSF or pension. The claimant had no social security provided by the employer. The employee in the circumstances was entitled to service pay under section 35(5) of the Employment Act which the court found was erroneously pleaded as severance pay. The intention was clear on use of words gratuity/severance for years worked. The service pay is awarded under section 35 (5) of the Employment Act for 15 days of every completed year being 2008 to 2015(12600/2x8) thus Kshs. 50,000.

Compensation for unfair termination

18. On finding unfair termination, the court is guided by the provisions of section 49 of the Employment Act on the remedies to issue. The claimant's services were terminated unlawfully and without procedural fairness. She had worked for the respondent from 2008 to 2016 when it took over from the Limoro estate. The court noted that the respondent had already paid Kshs. 80,000 as terminal benefits. The employee had died on the 30th January 2018 following an illness. The court taking into consideration the period of service, the payment of some terminal benefits by the employer, the unfairness in the termination and the fact that the employee had passed on following illness and burial costs born by the family, the underpayment which was not granted for being time barred, finds and determines that 12 months' compensation to her estate was deserved and the same is awarded (Kshs. 12600x 10) for the sum of Kshs. 151,200.

Conclusion

19. The court held that the termination of the services of the late Flora Ambasa Auko alias Ruth Ambasa Auko was unfair. The claims under continuing injury of overtime , underpayment and untaken leave were time barred. Judgment is entered for the claimant against the respondent as follows:-

1. Notice pay of Kshs. 12600
2. Service pay of Kshs. 50000
3. Compensation of Kshs. 151200
4. Less paid gratuity of Kshs. 80000
5. Total sum awarded of Kshs. 133,800.
6. Costs and interest at court rate from date of Judgment until payment in full.

20. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : - Khalwale



Respondent: - Andrew Gatambia

