



Ogembo & 5 others v SGA Security Solutions Limited (Appeal E094, E091, E092, E093, E095 & E096 of 2023 (Consolidated)) [2024] KEELRC 397 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 397 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E094, E091, E092, E093, E095 & E096 OF 2023 (CONSOLIDATED)**

M MBARŪ, J

FEBRUARY 15, 2024

BETWEEN

**E094 - MESHACK OGEMBO 1ST APPELLANT
E091 - BOAZ ABWAO 2ND APPELLANT
E092 - ALBERT AKOSE ONGONGO 3RD APPELLANT
E093 - THOMAS NYARIKI 4TH APPELLANT
E095 - ANDERSON KAZUNGU 5TH APPELLANT
E096 - JOSEPH WAHIMA 6TH APPELLANT**

AND

SGA SECURITY SOLUTIONS LIMITED RESPONDENT

(Being an appeal from the judgments of Hon. Omido, J.M., Senior Principal Magistrate delivered on 10 August 2023 Kwale Causes No. E023, E020, E021, E022, E024, E025 of 2021)

JUDGMENT

1. The appeals herein are consolidated under ELRC Appeal No. E094 of 2023. These includes ELRCA No. E091 of 2023, No. E092 of 2023, No. E093 of 2023, No. E095 of 2023, and No. E096 of 2023.
2. These appeals arise from the judgments in the following Causes;Kwale CM ELRC No. E023 of 2021;Kwale CM ELRC No. E020 of 2021;Kwale CM ELRC No. E022 of 2021;Kwale CM ELRC No. E024 of 2021; andKwale CM ELRC No. E025 of 2021.
3. The appeals relate to the same cause of action and claims. Appeal No. E094 of 2023 will be analysed to apply to all the consolidated appeals.



4. The appellant, Meshack Ogembo is an adult male. The respondent is a limited liability company carrying out business including offering security, courier services with its registered offices in Diani.
5. The appellant as employed by the respondent as a night security guard in May 2009 until November 2020 when he was constructively dismissed from his employment. At the time he was earning Kshs. 21,129.93 per month. he worked for 11 years and 8 months of which, 7 years and 5 months he was a casual employee and for 4 years and 3 months he was a permanent employee having been issued with a contract on 1st October 2016. In November 2020, the respondent attempted to coerce the appellant to enter into a new contract of employment lowering his wage and remove other benefits but he declined after which, his employment was terminated through dismissal. No terminal dues were paid. In December 2020, the appellant was denied entry into his office and his supervisor told him that the respondent had hired other persons. This resulted in unfair termination of employment on the grounds that the appellant would be subjected to overtime work without compensation, there was no notice pay, no annual leave and there was constructive dismissal. The appellant claimed the following dues;
 - a. One month notice pay of Kshs. 21,129.93;
 - b. Overtime from May 2009 to September 2016 Kshs. 721,807.80;
 - c. Holidays compensation May 2009 to September 2016 Kshs. 41,632.36;
 - d. Annual leave May 2009 to September 2016 Kshs. 98,403.76;
 - e. Leave travelling allowance at Ksh.950 for 7 years Kshs. 6,650;
 - f. Service pay for 11 years Kshs. 112,731.78;
 - g. Weekend compensation May 2009 to September 2016 Kshs. 192,482.08;
 - h. House allowance May 2009 to September 2016 Kshs. 163,193.96;
 - i. 12 months' compensation; and
 - j. Costs.
6. In response, the respondent admitted that the appellant was employed as a security guard initially on casual terms from 5 May 2009 and was then issued with letter of appointment dated 1st October 2016. The respondent was deducting and remitting statutory dues to NSSF and NHIF. In the year 2020, due to Covid pandemic and general business down time, the respondent reviewed its business and noted that Diani branch was a loss making venture and engaged the shop stewards together with 30 employees and agreed to downscale operations in Diani. The appellant was transferred to another station but declined to report to the new station. The other 24 employees agreed to the new terms while the 6 who declined had their terminal dues tabulated but declined to accept. The respondent prepared the Finalisation Agreement but the appellant refused to accept or execute it. The dues available were Kshs. 185,265.47 which sums are available for payment and Certificate of Service issued. The appellant was a contributing member of the pension scheme and the respondent was contributing as the employer.
7. The response was that by dint of Section 35(5) of the Employment Act, 2007 (the Act) service pay was not due to the appellant. There was no constructive termination as alleged. The appellant opted to abscond duty, an act of desertion. The hours of work were regulated and the issue of overtime or holiday or weekends pay does not arise. Due to desertion, the respondent had the option to effect summary dismissal but opted to be lenient and to spare the claimant from termination and his subsequent diminution in terms of clauses 4 and 10 of his contract and Section 10(5) of the Act, he



- refused to comply. The appellant has proceeded to calculate his terminal dues based on gross wage instead of basic pay contrary to Section 40(g) of *the Act* and these claims should be dismissed.
8. The trial court heard the parties and in judgment delivered on 10 August 2023 made a finding that there was unfair termination of employment and assessed the terminal dues including notice pay, 10 months' compensation, gratuity pay, certificate of service and costs of the suit.
 9. Aggrieved by the appeal, the appellant filed this appeal on six grounds;
 1. The learned magistrate erred in fact and in law in finding that the claim for overtime compensation, annual leave, leave travelling allowance and house allowance was time barred.
 2. The learned magistrate erred in fact and in law in finding that the claim for holiday and weekend compensation was not proven by the claimant;
 3. The learned magistrate erred in fact and in law by failing to exercise discretion to consider the import of the respondent's admission against the appellant's claim for overtime compensation, holidays compensation, annual leave, leave travelling allowance, weekend compensation and house allowance.
 4. The learned magistrate erred in law and fact by failing to correctly calculate the amount due to the claimant based on the evidence on record.
 5. The learned magistrate failed to consider the evidence and testimony of the claimant and thereby arrived at an erroneous decision.
 6. The learned magistrate failed to properly tabulate the final dues of the claimant consequently arriving at a wrong decision.
 10. The appellant is seeking that the appeal be allowed and the judgment be set aside or varied with the awards for overtime, weekend compensation and house allowances as pleaded together with costs.
 11. Parties attended court and agreed to address the appeal by way of written submissions.
 12. The appellant submitted that the trial court in error disallowed the claims for overtime, annual leave, leave travelling allowance and house allowances on the grounds that these were continuing injuries and hence time barred for being filed 12 months after they accrued. The basis applied was the provisions of Section 90 of *the Act*. Although the claims were filed in time within 3 years, the claims which accrued between 2006 to 2023/2027 while the appellant was employed on casual basis ceased upon letter of employment issued. In the case of *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR the court defined continuing injury to include payment of accrued dues. during the employment period, the appellant was owed his accrued dues. in the case of *John Kiiru Njiiri v University of Nairobi* [2021] eKLR the court held that upon cessation of employment, any claim arising from the employment relationship accrued. This position was reiterated in the case of *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR.
 13. The provisions of Section 90 of the Act must be interpreted in light of the circumstances of this case. The claims made did not accrue as a different cause of action calling for a separate claim under continuing injury. Payment of terminal dues included all owing and unpaid at the end of employment as held in *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR. The appeal should be allowed with costs.
 14. The respondent submitted that the judgment of the trial court is sound and should be confirmed and the appeal dismissed with costs. The appeal relates to alleged disallowance of the claims for overtime,



- holiday, annual leave and travelling allowances, weekend compensation and house allowances. Under the provisions of Section 90 of the *Act*, these were continuing injuries and ought to have been claimed within time after contract dated October 2016 issued. In the case of *Fidelity 7 Commercial bank Limited v Kenya Grange Vehicles Industries Limited* [2017] eKLR the court held that courts should adopt the objective theory of contract interpretation and profess the direct meaning without reference to anything outside the document. Between 2009 and 2016, the appellant was on a different type of employment. He ought to have claimed under such terms where any claim was due.
15. The respondent submitted that with regard to annual leave, the work records were filed. The appellant left employment in the year 2020 and any claim before 2017 is time barred. Under Section 28(2) of the *Act*, an employee cannot claim annual leave going back to 18 months.
 16. With regard to overtime, Section 27 allow an employee to take a rest day each week. The overtime claimed related to the period of 2009 to 2016 when the appellant was on causal terms of employment and any claims there of are time barred as held in *Edward Ochieng v Dan Okumu* [2022] eKLR. Similarly, claims for leave travelling allowances and house allowance relates to a period outside 3 years from the date the cause of action arose. Section 90 of the *Act* was properly invoked by the learned magistrate and this appeal should be dismissed with costs.
 17. This is a first appeal. The court is allowed to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand as held in the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] eKLR. Such mandate is defined to include jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable opportunity for the parties to open for rehearing both on questions of fact and law.
 18. The appellant's core contention against the judgment of the trial court is with regard to the claims for overtime compensation, holidays compensation, annual leave, leave travelling allowance, weekend compensation and house allowance. These claims were specific and covered the periods of the year 2009 to 2013 to 2017 when casual employment was converted to contract terms and a letter of appointment issued.
 19. Section 8 of the *Act* allow an employer to employment an employee on oral terms. Such employment is lawful and legitimate. It carries with it rights and benefits. Any right due ought to be claimed under such employment as and when due and within the meaning of Section 90 of the *Act*.
 20. In this case, where the appellant remained in the service of the respondent and had accrued overtime compensation, holidays compensation, annual leave, leave travelling allowance, weekend compensation and house allowance, due for the period of 2009 to 20117 when he was on causal terms of employment, these ought and should have been claimed as continuing injuries within 12 months while his employment was ongoing with the respondent, or before the lapse of 3 years as held in *Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel* (Cause E088 of 2023) [2023] KEELRC.
 21. Immediately the appellant was issued with a written contract on 1st October 2016 as pleaded under paragraph (5) of the Memorandum of Claim, his employment converted from oral to written and Section 9 and 10 of the *Act* applied to his terms and conditions. He ceased the causal employment. any claims accruing from the casual terms contract, as noted above ought and should have been addressed as a continuing injury under his written contract or as a spate claim within 3 years in accordance with Section 90 of the *Act*.



22. The appellant has relied on the cases of *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR, *John Kiiru Njiiri v University of Nairobi* [2021] eKLR but these arose under different circumstances from what the appellant had. There were ongoing contracts within which benefits accrued whereas the appellant's claims for unpaid dues arose under a different regime of employment that ended with the issuance of a written contract on 1st October 2016.
23. The learned magistrate analysed the facts and the law properly and the findings in this regard cannot be faulted. The claims going back to the period of May 2009 to September 2016 when written letter of appointment issued and relates to overtime pay, holiday compensation, annual leave and travelling allowance, weekend compensation and house allowances are time barred in terms of Section 90 of the *Act*.
24. As noted above, this being a first appeal, the court is allowed to review the entire record. In response to the claim, under paragraph (6), the respondent admitted that in the year 2020, due to Covid pandemic and general business down time, it reviewed its business structure and noted that Diani branch was a loss making venture and engaged the shop stewards together with 30 employees in the branch to scale down operations. 24 agreed to reviewed contract and 6 declined and also refused to accept the Finalisation Agreement. On the one hand, where an employer is faced with an operational issue that affect business operations, Section 40 of the Act allow the employer to lawfully terminate its employees or deploy them or reorganise the business as appropriate. Such measures are regulated in law to secure an employer who is no longer able to sustain its operations. The employee is also secured as the modalities for payment of terminal dues are chronologised under Section 40(1) of the *Act*. The other part is that, where an employee fails to abide the lawful instructions of the employer so as to avoid a lay off due to business down time, such an employee is defined under Section 44(4) (e) of the *Act* as being of gross misconduct subject to summary dismissal.
25. In this case, the respondent did not apply its prerogative under Section 40 of the *Act*. Where it did and some employees agreed to sign new contracts, such matter was covered under Section 10(5) as the subject employees accepted new contracts. Where the appellant refused to take the new contract with less terms and benefits, it was his right to do so as under Section 10(5) of the *Act*, his consent was necessary. However, the alleged refusal to report to the new duty station was not addressed. The offer to pay terminal dues in these circumstances did not validate the lapse on the respondent's part.
26. The learned magistrate, though for different reasons properly made a finding that there was unfair termination of employment and the assessed award is not faulted. Compensation allocated is at the discretion of the learned magistrate and unless there are submissions that that discretion was not applied judicially, the assessment is hereby affirmed.
27. This is applied to the assessed notice pay. This is justified.
28. On the claim for service pay, indeed, the learned magistrate analysed the provisions of Section 35(5) and (6) of the *Act* with a finding that the appellant was registered and his remittances made to the statutory bodies for social security and health. the respondent offered to pay gratuity. This is acceptable.
29. Issuance of a Certificate of Service is lawful and a requirement under Section 51 of the *Act* which was properly analysed and allocated.
30. Ultimately, the judgment of the learned magistrate is sound and is hereby confirmed on its terms and awards. The appeal herein is found without merits and is dismissed save, for this appeal, each party will bear own costs.



31. The findings above shall apply in all the consolidated appeals in; Appeal No. E091 of 2023 - Boaz Abwao Appeal No. E092 of 2023 - Albert Akose Ongong'o Appeal No. E093 of 2023 - Thomas Nyariki Appeal No. E095 of 2023 - Anderson Kazungu Appeal No. E096 of 2023 - Joseph Wahima

DELIVERED IN OPEN COURT AT MOMBASA THIS 15TH DAY of FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

