



Arisa v Kipkebe Limited (Employment and Labour Relations Cause E005 of 2023) [2024] KEELRC 1232 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E005 OF 2023**

HS WASILWA, J

MAY 23, 2024

BETWEEN

GEOFFREY NYAMAMBA ARISA CLAIMANT

AND

KIPKEBE LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this suit by a memorandum of claim dated 13th March, 2023, alleging to have been unfairly terminated and seeking compensation for the unfair termination. The claimant sought for the following reliefs:-
 - a. A declaration that the disclaimer signed by the claimant on 24th of April, 2020 was obtained by duress, coercion, misrepresentation, fraud and/ or undue influence and thus a nullity.
 - b. A declaration that the claimant's termination was unfair and unlawful.
 - c. A declaration that the respondent acted in contravention of Articles 27, 28 and 41 of *the Constitution* of Kenya.
 - d. Maximum compensation for unlawful and/ or unfair dismissal (section 49 (1)(c) *Employment Act*.
 - e. Unpaid overtime Kshs. 1, 678,752.
 - f. General damages under Article 23 of *the constitution* for the violation and/or breach of the claimant's right in prayer (c) above.
 - g. A certificate of service under section 51 of the *Employment Act*.
 - h. Cost of this suit and interest on all the amounts herein until payment in full.



- i. Any other or further relief this honourable court may deem fit to grant.

Claimant's case

2. The claimant was employed by the Respondent on 16th March, 2015 as an assistant Estate manager, Magura Estate on permanent and Pensionable terms. On 12th August, 2019, the claimant was transferred from Magura Estate in Nyamira to Sasini out growers in Kapkatet, Kericho County under the same position, which he held till his termination on 24th April, 2020. At the time of termination, the claimant was earning a gross salary of Kshs. 60, 975.
3. He stated that at all material terms, he used to report to work at 7 am and leave at 8pm or 9pm depending on the days' workload.
4. The claimant states that when he was transferred from Magura Estate in Nyamira County to Sasini out growers in Kapkatet, Kericho County, he was assigned new duties of managing the Respondent's contracted fleet of trucks and laisse with famers to build set crop targets and extension works.
5. He contends that these new duties were completely in variance from his initial duties, but that the Respondent did not train him on the new role.
6. He avers that at the time he was deployed to Sasini Estate, the Respondent had engaged around 25 different independent contractors to transport green tea from famers to the Respondent's 2 factories. i.e. Kipkebe Factory and Keritor factory.
7. Sometimes on 11th February, 2020, one of the transport contractors that had been assigned by the Respondent to transport green leaf from Kimulot leaf catchment area to the Respondent's Keritor factory failed to turn up for work, severely compromising that day's leaf transport.
8. To mitigate on the failure by the independent contractor, the claimant instructed a different contractor but that the transportation of the green leaf was done late and eventually rejected by the Respondent, leading to loss of the consignment worth Kshs 83,202.
9. On 17th February, 2020, the Respondent wrote a letter to the claimant regarding the loss and asking for answers, which the claimant responded on 21st February, 2020 explaining the circumstances leading to late delivery, rejection and subsequent loss of the Respondent's green leaf.
10. On 6th March, 2020, the claimant was placed on compulsory leave for a period of 17 days to pave way for investigations. On 1st April, 2020, the claimant made a further response to the show cause letter. He states that he was heard on the disciplinary hearing on the 6th April, 2020 and thereafter, the Respondent made a decision to terminate his services.
11. He states that on 24th April, 2020, he was forced to sign a disclaimer, vacate the employers house within 6 days before 1st May, 2020., when he had not paid his April salary and thus did not have any means to move from the said house. He maintains that he was forced to sign the disclaimer before he could be paid his April, 2020 salary.
12. The claimant contends that he was singled out of several employees who were in charge of delivery of green tea leaf delivery on the fateful day and subjected to disciplinary action alone and later dismissed, when all the other employees were not question or any action taken against them.
13. By a rejoinder dated 26th May, 2023, the claimant denied the defence against his claim and reiterated the contents of the claim.



Respondent's case

14. The Respondent entered appearance through the firm of Nanda, Ogange and Company Advocates and filed a response to claim dated 12th April, 2023. In it, the Respondent admitted to employing the claimant but denied unfairly terminating him.
15. He stated that it is industrial practice that persons holding managerial position are expected to work overtime without claiming compensation. Further, that the claim of such overtime, in any event, is statute barred.
16. The Respondent maintained that the claimant was negligent in executing his duties as a manager causing the Respondent to incur loss of Kshs. 83,202 being purchase of 3396 Kgs of Green tea leaf.
17. The Respondent blamed the claimant for the loss because he failed to plan adequately for the transportation of the green tea leaf, authorized purchase of tea leaf at 1700 hours in breach of company's policy and failing to coordinate for the receipt of green leaf at the factory despite being out of time on delivery timelines.
18. It is stated that since the claimant was the manager and in charge of coordinating the delivery of the green leaf, he was the one responsible for the late delivery that caused losses to the Respondent. Hence, his juniors could not be held liable and thus, he was not singled out as alleged.
19. The Respondent reiterated that the Claimant was negligent and was subjected to procedural fairness and therefore that the termination was justified.
20. After termination, the Respondent stated that, the claimant signed a release and discharge out of his own free will.

Evidence

21. During hearing, the claimant testified as CW-1 and adopted his witness statement of 13/3/2023 and produced the claimant's documents which were marked as Exhibit 1-7 respectively. He testified that when he was transferred to Sasini Estate, Kericho County, his main role was to mobilise green leaf from various farmers, while in his previous position, he was in charge of production of tea.
22. He testified that in the previous station, he was housed within the Estate, however in the subsequent station, he was housed by the Respondent in a neighbouring Estate about 40 KM from the estate but was allocated a Motor bike for coordination. That he used to report at 7 am and leave by 10 pm. He told this court that they were usually paid by 28th of each month, however in April, 2020, he was not paid as usually and following up, he was directed to first sign a discharge voucher, after which, he will be paid his April, Salary. He testified that he was an assistant manager, working under David Keter but that the said Mr. Keter was not subjected to any disciplinary process.
23. He testified that though the company policies was breached for purchasing the green leaf late, the same was necessary because the farmers had been requested to harvest the green leaf and thus, it would have been unfair not to purchase the green leaf. He testified that transportation of the green leaf was outsourced therefore that it was beyond the control of the company. He added that delivery of green leaf late was something that happened from time to time, depending on failure of the outsourced transport.
24. He testified that on the fateful day, he reported to work as usually and at around 8 am, Daisy Cheron, purchase clerk for Kimulot area, informed him that truck registration No. KCN 539P picking from Kimulot area had not reported to work, forcing him to look for alternative. On Getting the alternative



vehicle, the capacity was small and required the green leaf to be picked twice. After picking the second consignment, the purchasing Clerk, called the claimant at around 1 pm and informed him, that she required a 3rd truck, however, since none was available, the second truck was loaded with 3396 Kgs, but was delivered late, not allowed access by the Respondent and thus by the next day, the consignment had spoiled. He explained that the consignment arrived late in the evening but that the factory manager refused to accept the green leaf. That he made a phone call to his supervisor Mr. Keter, but did not pick, he then called the General manager Peter Langat to talk to the factory manager to accept the consignment but that the General manager directed him to go back with the green leaf and since it was around 11pm and didn't have anywhere to spread the green leaf, he opted to spread them in a field on the road side but since the same was not properly spread, the green leaf, was found damaged and thus could not be taken to the market.

25. He testified that he was not given a warning letter or an opportunity to explain himself.
26. Upon cross examination, he testified that he is not complaining on the transfer but the change of duties. He stated that he was assigned the role of coordinating the truck delivering green leaf. He told this court that he was forced to sign a discharge Voucher before he could be paid his April, 2020 salary. He stated that green leaf could only be accepted upon it being communicated to the Factory manager. He reiterated that he communicated the late delivery to the factory manager.
27. He testified that after termination, he sought for time to relocate his family from the company's house but that he was ejected out of the house on 1st May, 2020, when his dues had not been paid.
28. On re-examination, the claimant testified that he signed the discharge Voucher on 18/5/2020 and the date indicated as 24th April, 2020 in the memorandum of claim was erroneous. On overtime pay, he stated that Keya, the Group Human Resource officer, indicated in her statement of 12/4/2023 that managers were expected to work extra hours and assigned overtime, as such overtime ought to have been paid to him.
29. The first respondent's witness was Peter Langat, the Deputy General manager, who testified as RW-1 . He adopted his statement of 12/4/2023 and testified that he was the chair of the disciplinary committee and the person that read the charges to the claimant. He admitted that he was called by the claimant during the day of the incident and informed that the green leaf was not allowed into the factory. He stated that green leaves are usually accepted till 5.30 pm as a company policy.
30. Upon cross examination, he testified that the claimant was negligent but could not elaborate on the same and stated that the claimant's supervisor can elaborate on the negligence. He testified that the only part he was aware of was the late report to the factory. He confirmed that the claimant was informed on 24th April, 2020 to vacate the company house by 1st May, 2020, 6 days away. He also confirmed that the claimant was not paid in April but could not tell when he was paid. He testified that the discharge voucher was signed on 18th May, 2020. He confirmed that he was not interrogated by anyone on the events of 11th April, 2020. He also confirmed the claimant supervisor, Mr. Keter, was not investigated. Further that the factory manager Mr. Christopher Odhiambo, left the Respondent, employment. He also admitted to have been called by the claimant on the fateful day and informed that the barriers guards had refused them entry to the company and in turn, he advised the claimant to retain the consignment till the next day. He also stated that they never considered surcharging the claimant but did not give any reason.
31. RW-2 was Daniel Keter, the Deputy General manager and in charge of Sasini out growers. He adopted his witness statement of 12/4/2023 and testified that the challenges experienced by the claimant on



- 11/4/2020 were not brought to his attention. He maintained that the delivery of green leaf in Kimulot area was in the docket of the claimant.
32. Upon cross examination, he testified that all managers' report at 7 am and only leave when all green leaf had been delivered to the factory. He confirmed that transported of the said green leaf were outsourced and the drivers were not their employees. He stated that ordinarily managers can be given a warning but in this case, the claimant was not given any warning because he had committed gross misconduct. He stated that overtime is only paid to those employees outside the management cadre. He stated that he only found out about the loss the next day. He also testified that green leaf are usually delivered by 6 pm and in case of late delivery, the claimant ought to have communicated to the management by 5 pm for proper arrangement to be made.
33. RW-3 was Michael Towett, the Respondent's transport programmer. He adopted his statement of 12/4/2023 and upon cross examination he testified that on 11/2/2020, he came to work as usual and after delivering his consignment in KCT 308F, he was directed to go to Kimulot to assist with another consignment, which ordinarily was to be delivered by KCN 539 P. That he was instructed at 4pm and since the area was far, he manage to pick the consignment and delivered at 9 pm. That he was in the company of the purchasing Clerk, Daisy Cheron. He testified that when they got to the factory barrier, they were denied entry by the guards at the barrier. He testified that Daisy talked to Arisa, who directed them to take the green leaf to Kapkatet and preserve them well, however that even after doing that, the leaf was spoilt by the next day. He told this Court that since they did not get any assistance from the factory, he spent Kshs 1000 in paying people to offload the tea to be spread on the grounds till the next day.
34. RW-4 was Prisca Keya, the Group HRM. She adopted her witness statement of 12/4/2023 and produced the summary report.
35. Upon cross examination, the witness testified that she has worked for the Respondent for 13 years and that for all those years, they have always outsourced vehicles to transport tea. She testified that green tea leaves were to be delivered latest 6.30 pm but on being shown the daily summary where some of the tea was delivered past 6 pm, she stated that the delay was an expected occurrence. She stated that they normally pay their employees on 26th of each month but that the claimant was paid his April salary in May, after the discharge procedure and clearance. She attributed the delay in payment in the time taken by the claimant to clear from the Respondent company.
36. She testified that the tea collected by the claimant were rejected and usually the blame is on the managers in charge. She admitted that transport was to be provided to facilitate movement. She also stated that the drivers were investigate but not surcharged.

Claimant's Submissions.

37. The claimant submitted on three issues; whether the discharge/disclaimer signed by the claimant on the 18th May, 2020 was obtained by coercion and thus a nullity, whether the claimant was unfairly/unlawfully terminated and whether the claimant is entitled to the reliefs sought.
38. On the first issue, it was submitted that the Respondent illegally forced the Claimant to sign a discharge Voucher on 24th May, 2020, to absolve the employer from any legal liability against the law. In support of this, the claimant relied on the case of Thomas De La Rue (K) Ltd V David Opondo Omutelema [2013] eklr and the case of Hussamuddin Gulamhussein Pothiwalla, Administrator, Trustee and Executor, of the Estate of Gulamhussein Ebrahimji Pothiwalla V Kidogo Basi Housing Corporative Society Limited and 31 Others [2009] eklr.



39. Similarly, that having been forced to sign the discharge voucher, the same was signed under duress and therefore does not have any legal force and is a nullity. Hence, it cannot absolve the employer from statutory obligation or preclude this Court from enquiring into the fairness of the the termination.
40. On the second issue of whether the termination was unlawful, the claimant relied on the case of *Walter Ogal Anuro Vs Teachers Service Commissions* [2013] eKLR and the case of *Pius Machafu Isindu V Lavington Security Guards Limited* [2017] eKLR which Court, gave the two conditions that must be met for termination to be justified, to wit, procedural and substantive justification.
41. On substantive fairness, it was submitted that the claimant was termination on unsubstantiated grounds because the Respondent did not show how the claimant was negligent in his duties, when the independent contractor was the one that failed to turn up causing delays, which he did not have control over. It was argued further that the Claimant sought for alternative trucks and only got hold of a truck late in the evening at 4 pm, which loaded the green leaf and go to the factory at 9pm, but were not allowed into the factory despite him making several phone call to his supervisors and the General manager of the factory. Additionally, that it is the Deputy General manager that advised the claimant to go back with the green leaf and deliver it the next morning and therefore that they delay was beyond his control.
42. It was submitted that despite giving and explanation for the delay and even seeking directions from his superiors, the claimant was still held personally liable and terminated. He argued that based on the explanation given, the reason for termination of the claimant's services, was not justified in the circumstances.
43. Furthermore, that all the witnesses that testified on behalf of the Respondent never elaborated on the alleged negligence by the claimant, therefore making the reason for termination not plausible.
44. The claimant argued that the independent transport contractor, who had been engaged to transport the green leaf, are the ones that ought to be held liable for the delay, because, they failed to show up to the factory and never communicated their absence on time. Additionally, that the purchasing Clerk, Daisy Cheron, confirmation that she dispatched the first truck with 1000kg when the said truck carried 3500kg, was another negligence on the part of the purchasing clerk, which the Respondent did not consider.
45. On alleged breach of company policy of having the green leaf delivered before 6pm, the claimant argued that the clocking sheet of the material day show that Daisy logged out at 9.02 pm, Sharon Chengeno clocked out at 8.13pm, Nicholas Kiprotich logged out at 7.38pm and Stephanie Rono logged out at 7.38 pm, demystifying the allegation of breach of Company policy and confirming that the green leaf could at times be delivered late in the evening depending on intervening circumstances. On that basis, the claimant submitted that the draconian measure taken against him of termination, instead of surcharging was unfair and discriminatory.
46. On procedural fairness, the claimant submitted firstly, that RW-4 argued that all the managers were investigate, did the investigations against the claimant, carried out disciplinary hearing and made the decision to terminate the claimant, as such the said managers were the accusers, investigators, prosecutors and judges in their own course, a fact that vitiated the entire disciplinary process as it offended the rules of natural justice and violated the claimant rights under Article 47(1) and 50(1) of *the Constitution*. In support of this, the claimant relied on the case of *Alnashir Popat & 7 Others V Capital Marketas Authority* [2020] eKLR.
47. It was submitted further that the way the termination was carried out, the Respondent was in violation of section 41, 43 and 45 of the *Employment Act* as procedural and substantive fairness was not met.



48. On the reliefs sought, the claimant submitted that due to the abrupt nature of his termination, he was forced out of the Respondent employment and company house without any notice or pay, in violation of his right to dignity guaranteed under Article 28 of *the Constitution*. In support of this view, he cited the case of Republic V Kenya National Examination Council & Another Ex parte Audrey Mbugua Ithibu[2014] eKLR .
49. The claimant also argued that his right to Fair Labour practices under Article 41 of *the Constitution* was violated in the way in which his employment was terminated without any justifiable reason. On that note, the claimant urged this Court to find the Respondent in violation of his right and grant the appropriate reliefs of general damages under Article 23(3) of *the Constitution*.
50. On general damages, it was argued that having established that his rights under Article 23,28 and 41 were violated, he is entitled to award of general damages as was awarded in the case of VMK Vs Catholic University of Eastern Africa[2013] eKLR and the case of Jonathan Spangler V Center for African Family Studies(CAFS) [2017] EKLr where the claimants were awarded Kshs 5,000,000 and USD\$ 145,773 respectively. On that basis, he prayed for an award of Kshs, 5,000,000 as general damages.
51. On overtime claim, it was submitted that the claimant being a manager used to clock in at 7 am and leave at 8 pm and at times late at 10pm, therefore clocking between 4-5 hours on weekdays and 6 hours during weekends. He argued that the Respondent did not deny that fact and instead, explained that managers are ordinarily expected to work overtime without pay as it's an industrial practice. He then worked out the overtime pay and stated that since he was paid Kshs. 60,000 a month, the daily rate is Kshs 2,307 and hourly rate is Kshs 288. Therefore, that having worked overtime from September, 2015 to April, 2020, he is owed Kshs 1,678, 752 worth of overtime pay.
52. On compensation for the unfair termination, the claimant prayed for the maximum award of compensation in line with section 49 of the *Employment Act* for the reason that the termination was done without any reason. In support of this, he relied on the case of Mercy Njoki Karingithi V Emerald Hotels Resorts & Lodges Ltd[2014] eKLR.
53. The claimant also prayed for an award of costs of suit and interest citing the cases of Jasbir Singh Rai & 3 Others Vs Tarlochan Singn Rai & 4 Others [2014] eKLR and the case of B.O.G Tambach Teachers Training College V Mary Kipchumba[2018] eKLR.

Respondent's Submissions

54. The Respondent on the other hand submitted on two issues; whether the claimant's dismissal is unfair and or wrongful and whether the claimant is entitled to the reliefs prayed for in the statement of claim.
55. On the first issue, it was submitted that termination of employment is guided by Section 43, 44 and 45 of the *Employment Act*. In this, he relied on the case of Anthony Njenga Kuria V Bata Shoe Company (K) Limited [2017] eKLR and the case of Walter Ogal Anuro V Teachers Service Commission [2013] eKLR.
56. On substantive justification, the Respondent relied on the case of National Union of Mineworkers V IEMO [2019] EWHC 1359(COMM) and submitted that as per the claimant's job description, he was required to coordinate delivery of green leaf to the Respondent's factory before 6pm and in case of delay, notify the Respondent on time but that in this case, the claimant did not notify the factory manager of the delay on time until 9 pm, when the green leaf reception personnel had been released. Therefore, that the failure by the claimant to communicate the delay to the factory management on time, caused the Respondent to lose the entire consignment worth Kshs 83,202. Therefore, his actions were careless, negligent and improper amounting to gross misconduct that justifies summary dismissal



- under section 44(4) of the [Employment Act](#). Hence the respondent had a justifiable reason to dismiss the claimant.
57. On procedure, it was submitted that the same is provided for under Section 41 and the elements to be met are listed by the court in the case of Postal Corporation of Kenya Vs Andrew K. Tanui [2019] eKLR. On that note, the Respondent submitted that it first sought an explanation from the claimant by the letter of 17th February, 2020, then issued a show cause letter of 2nd March, 2020, placed the claimant on compulsory leave by the letter of 6th March, 2020 to pave way for investigation, invited him for disciplinary hearing on 2nd April, 2020 by the letter of 27th March, 2020, where he was advised to take a representative to the meeting and then he was heard orally. He argued that based on the procedure adopted, the claimant was subjected to proper disciplinary process before decision was made for his termination.
 58. On reliefs sought, it was submitted with regard to disclaimer voucher that the claimant did not place any disclaimer voucher dated 24th April, 2020 thus this court cannot pronounce itself on a document which is not before it. In support of this, they relied on the case of Atieno V Timaflo Limited [2024] KEELRC 724(KLR).
 59. It was argued further that there is nothing that has been tender in evidence to confirm the allegations that the claimant was coerced into signing the discharge voucher, in any case that the discharge voucher on record is one dated 18th May, 2020 and not 24th April, 2020. Thus the allegations that he was forced to sign the discharge voucher to receive his pay is without any basis.
 60. Based on the arguments above, the Respondent submitted that the termination of the claimant was justified and without any violation of his rights under [the constitution](#) and the law. Further that the allegations of violation of [the Constitution](#) have not been strictly pleaded and proved as is required in the case of Anarita Karimi Njeru V Republic (1976-1980) KLR 1272 and the case of Mumo Mutemo V Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
 61. On compensation, it was submitted that the claimant performed his duties carelessly causing his termination, hence the Respondent cannot be blamed for taking the action it took. The Respondent however submitted that in the event the claimant is awarded compensation then one month's salary suffice. In this, he relied on the case of Kiambaa Dairy Farmer Cooperative Society Limited, and case of United States International University V Eric Rading Outa [2016] eKLR and the case of Samsung Electronic East Africa Ltd V KM [2017] eKLR where the claimant who had been awarded maximum compensation of 12 months, upon appeal were reduced to 2,3 and 2 months respectively.
 62. On overtime claim, the Respondent submitted that the same is firstly, statute barred. Secondly that such claim is in the nature of special damages that need to be pleaded and strictly proved. In this, he relied on the case of Philip Omukule V Trapez Contactors Ltd [2021] eKLR and the case of James Orwaru Nyaundi V Kilgoris Classic Sacco Limited [2022] eKLR.
 63. Accordingly, he argued that the claimant has not proved the overtime claim but only made a blanket statement that he used to report to work from 7 am to 8 pm. He added that the claimant ought to have given the days he worked till 8pm and days worked till 9pm and 10 pm
 64. On general damages, it was argued that since the claimant did not strictly prove the violation of his right under the Constitution, he is not entitled to the general damages sought under Article 23 of [the Constitution](#)
 65. On issuance of certificate of service, the Respondent submitted that it issued the claimant with certificate of service date 26th June, 2020 as such the prayer does not lie.



66. The Respondent submitted also that costs follow event and prayed to awarded costs of this suit. In this he relied on the case of Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai and 4 Others [2014] eKLR.
67. I have examined all the evidence and submissions of the parties. The issues for this court's determination are:
- (1) Whether the Claimants' termination was fair and justified.
 - (2) Whether the Claimant is entitled to the remedies sought.

ISSUE NO. 1

68. The Claimant submitted that he was unfairly terminated for reasons not his making. He contends that he was assigned duties of managing transportation of green leaf to factories which was not work that was done by him in the previous duty station and that transportation was an outsourced activity and so control of drivers was beyond him.
69. The Respondents admitted that indeed transportation of green leaf was indeed outsourced.
70. The Respondents witnesses aver that the Claimant did not plan adequately for transportation of green leaf and also authorised purchase of the tea late at 17 hours and failed to plan adequately for its receipt at the factory and was therefore negligent in his duty.
71. RW1 however admitted the Claimant called him on the fateful day and he advised him to retain the consignment until the following day.
72. RW2 indicated that the challenges were not brought to his attention.
73. RW3 pointed out what happened on the fateful day and how he transported the tea at 4 pm and since the distance was far, he delivered it at 9 pm and the consignment was rejected.
74. It is apparent that the issue of transportation of green leaf was an outsourced activity. It is also apparent that the vehicle that was to transport the green leaf that got spoilt was KCN 539 P but since the vehicle was not available, motor vehicle KCT 307 F was asked to pick the consignment. The driver was asked to do the delivery at 4 pm.
75. Whether the Claimant was negligent for the omission of the transportation is not clear as the activity was outsourced as explained above. His main duty was to coordinate. The Claimant explained that he did his best in the circumstances and even got an alternative vehicle, however late. He also liaised with his supervisor Mr. Keter and the factory manager Mr. Odhiambo who admitted was called by the Claimant on the fateful day as per evidence of RW 1 who advised the Claimant to retain the consignment till the next day.
76. From the above analysis of evidence, it is apparent that the Claimant though blamed for the loss of the tea equivalent to about 80,000Kshs was not wholly to blame. There were other intervening circumstances that led to this loss. The time, the distance, the lapse in the transportation e.t.c. All these contributed.
77. The Claimant also indicated that previously he was housed within the factory but now stayed 40 kilometres away and without any means of transport in form of a motor bike, co-ordination of his work became difficult.
78. Having found as above, it is my finding that the reasons assigned to the Claimant's termination were not valid as provided for under section 35 of the [Employment Act](#) 2007.



79. The Claimant was taken through a disciplinary process as per section 41 of the *Employment Act* 2007 but there being no valid reason for termination, I find his termination unfair a per section 45 (2) of the *Employment Act* 2007 which states as follows:”-

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 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.

ISSUE NO. 2

80. Having found the termination unfair, what remedies is the Claimant entitled to? The Claimant sought to be paid compensation for unfair termination which I find he is entitled to and having been terminated without valid reason and given the length of time served with respondents who decided to terminate him unfairly, I find 8 months salary will be adequate compensation which I award at $8 \times 60,975 = 487,800/=$

81. The Claimant also sought to be paid overtime which the Respondent submitted was time barred and not payable as Claimant was a Manager.

82. The Respondents witnesses admitted that indeed the Claimant worked over the time expected and as per such he is indeed entitled to overtime pay.

83. The Claimant set out his overtime pay at 4 to 5 hours and 6 hours on Saturday. The RW 3 and 4 agreed that the Claimant worked overtime and was not to be paid as he was a Manager. The reason behind this was not explained and was not backed up with any evidence. Working overtime without pay in my view amount to servitude.

84. The issue of whether the claim for overtime is time barred can be explained from the judgment in the Court of Appeal in CA No. 325 & 342 of 2018, (Consolidated) *The German School Society Vs. Helga Ohany* eKLR 20 where the Judges of Appeal Okwengu, Omondi & Mativo held that:

“ 35. 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 & 468Others* [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.

36. Locally, there appears to be a paucity of court decisions defining the phrase “a continuing injury.” The *Employment Act* does not define the said phrase. We are alive to the dictate in Article 259 of *the Constitution* which requires courts to advance the development of the law. We shall attempt to judicially define what constitutes “a continuing injury.”
37. The principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. “A continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. The Supreme Court of India in *Balakrishna S.P. Waghmare v Shree Dhyaneshwar 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.”

38. Also relevant is *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.....

In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition..... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

39. Also, the Supreme Court of India in *M. Siddiq v Suresh Das* (2020) 1 SCC 1 observed:

343. "... A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. [...] Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may endure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation."



40. The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. The existence of an employment relationship is the condition that determines the application of the labour law provisions. It is the key point of reference for determining the nature and extent of employers' rights and obligations towards their workers.
41. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90."

85. From this holding, the claim for overtime pay falling under a continuing injury as provided for under Section 90 of the *Employment Act* cannot therefore be time barred.
86. Having found as this, the issue is whether the Claimant has proved his overtime pay entitlement?
87. The Claimant set out the claim seeking pay of 1, 678, 752 as per his paragraph 18 (e) of the claim. The Claimant however failed to set out particulars of the overtime pay till his submissions which didn't explain much in evidence. It is my finding therefore that this limb of the claim is not provided but is just set out and is therefore not payable.
88. I therefore find that the Claimant is only entitled to the following:
- (1) Compensation of 8 months pay for the unlawful termination = 8 x 60,975 = 487,800/=
 - (2) 1 month's salary in lieu of notice = 60,975/=
- Total = 548,775/=
- Less statutory deductions
- (3) Issuance of a Certificate of Service
 - (4) Costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGEMENT DELIVERED VIRTUALLY ON THIS 23RD DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of: -

Ratemo for Respondent – Present

Magata for Claimant – Present

Court Assistant - Fred

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