



**Kenya Union of Commercial, Food & Allied Workers v Kensom Supermarket (Cause E022 of 2024) [2024] KEELRC 13268 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13268 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E022 OF 2024  
JK GAKERI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**KENSOM SUPERMARKET ..... RESPONDENT**

**JUDGMENT**

1. The Claimant union commenced the instant suit by a statement of claim filed on 28<sup>th</sup> March, 2024 dated on even date alleging non-payment of salary and terminal benefits to Mr. Isaac N. Ongeru.
2. The Claimant avers that the dispute was reported to the Ministry of Labour and Social Protection.
3. That the grievant was employed by the Respondent on 1<sup>st</sup> August, 2019 as a Baker earning Kshs.20,000.00 per month.
4. It is the Claimant’s case that on 26<sup>th</sup> March, 2021, the grievant and another unnamed person were summoned by Mr. Hassan Ali Hussein to the office to discuss some issues where they found a knife on the chair which was being used to cut electric cables.
5. That Mr. Obara was asked to remove the knife so that they could sit on the chair and after a few minutes DCI officers from Keroka Police Station came and arrested the two and were charged of threatening to kill the Manager, Mr. Hassanoor Ali Hussein, but later acquitted and reported their termination of employment to the union and attempts to resolve the dispute amicably were unsuccessful.
6. That, Mr. Wilson Luvalo of the Kisii Labour Office was appointed a conciliator and invited the parties for meetings on 28<sup>th</sup> July, 2021 and 14<sup>th</sup> November, 2023 but the Respondent did not attend.



7. The Claimant avers that the Conciliator proposed that the process be put on hold until the criminal case was concluded but he did not issue a conciliation report despite the Claimants persuasion and the Secretary Kisii Branch sworn an Affidavit to that effect.

That the claim is properly before the Court.

The Claimant prays for:

- i. One months salary in lieu of notice Kshs.20,000.00
- ii. Unpaid salary for 27 months Kshs.540,000.00
- iii. 2 years leave Kshs.40,000.00
- iv. Public holidays worked and unpaid Kshs.18,666.00
- v. House Allowance 27 months Kshs.81,000.00
- vi. Service pay for 2 years Kshs.40,000.00
- vii. 12 months compensation Kshs.240,000.00
- Total Kshs.979,666.00
- viii. Certificate of service
- ix. Any other order the Court deems fit and just.
- x. Costs of the suit.

### **Respondent's Case**

8. Court records reveal that the claim was served on the Respondent on 19<sup>th</sup> April, 2024 by one Diffinah Muithaga Nyabena, and one Mr. Kariuki declined service and the documents were left at the Respondent's premises.
9. The Respondent did not file a response to the claim or attend the mention slated for 24<sup>th</sup> September, 2024.

### **Claimant's evidence**

10. CWI, Mr. Isaac Ongeru testified that the Respondent's former name was Supermatt and the name changed around September 2022 and worked there as a Baker from 2019 until March 2021.
11. The witness alleged that he was accused of having planned to beat up Mr. Noor, the son of the owner of the Respondent and was arrested at the work place and charged for being armed with a piece of wood.
12. The witness further testified that prosecution witnesses did not attend Court to give evidence and the Court discharged them under the provisions of the Criminal Procedure Code.
- The witness urged the Court to rely on the evidence provided.
13. In his written statement, the Claimant states that he and a colleague were summoned to Mr. Hassanoor's office on 26<sup>th</sup> March, 2021 and were arrested in a few minutes by DCI police officers and charged.
14. However, the charge sheet availed by the Claimant reveals that they were arrested on 7<sup>th</sup> March, 2021 and charged on 8<sup>th</sup> March, 2021 and released on cash bail on the same day.



## Claimant's Submissions

15. As to whether the grievant was unlawful and unfairly terminated from employment, the union relied on the provisions of Section 41 of the *Employment Act* and the sentiments of the Court in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR to urge that the Respondent did not comply with the mandatory procedure and had no substantive justification for the termination of employment.
16. On reliefs, the Claimant submitted that the grievant's employment was terminated by virtue of the arrest without notice or pay in lieu of notice, had pending leave for 2 years and is entitled to compensation.
17. Reliance was made on the sentiments of the Court in *Stephen Karisa Jetwa V Elsek & Elsek (K)* [2014] eKLR on the burden of proof of leave days.

The Respondent did not file submissions.

## Analysis and determination

18. Having considered the claim, witness statement and submissions by the union, the issues that commend themselves for determination are
  - i. Whether the grievant was an employee of the Respondent.
  - ii. Whether the grievant's employment was terminated by the Respondent unfairly or unlawfully.
  - iii. Whether the suit is statute barred.
  - iv. Whether the Claimant is entitled to the reliefs sought.
19. As to whether the grievant was an employee of the Respondent, the grievant's written statement states that he was employed by the Respondent from 1<sup>st</sup> August, 2019 as Baker earning Kshs.20,000.00 in a month.
20. As held in *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR citing *Monica Kanini Mutua V Al-Arafat Shopping Centre* and another [2014] eKLR, in an undefended suit the Claimant established all facts of the claim and must prove the existence of an employment relationship with the employer as a preliminary issue before establishing the alleged unfair termination of employment.
21. In the instant case, although the grievant (Mr. Isaac Ogeri) did not provide a letter of employment, the Respondent has not denied that fact. But more importantly, the Claimant has attached four (4) receipts of payment of union dues by the Claimant dated October and November 2020.
22. Similarly, the Claimant availed copies of letters from the Ministry of Labour and Social Protection which reveal that the dispute was reported to the Minister in 2021 but it was not until 2023 that a conciliator was appointed and the grievant had a pending criminal case which concluded in June, 2023.
23. In the absence of controverting evidence, the Court is persuaded that the grievant was an employee of the Respondent as alleged.
24. As to whether termination of the grievant's employment by the Respondent was unfair or unlawful, the grievant's written statement is silent on when and how his employment was terminated and by whom.



25. Relatedly, the grievant adduced no evidence to explain when he reported back to the workplace after the alleged arrested on 26<sup>th</sup> March, 2021 while in Mr. Hassanoor's office. Without such evidence, it is difficult for the Court to discern what transpired and how the grievant found himself out of employment.

Section 47(5) of the *Employment Act* provides that

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

26. In *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* [2016] eKLR Abuodha J expressed himself as follows as regards Section 47(5) of the *Employment Act*:

“The burden does not become any less on the employer simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in pleadings, which are not backed by any evidence and expect the Court to find in his or her favour”.

The Court is guided accordingly.

27. The emerging jurisprudence on the import of Section 47(5) of the *Employment Act* is that the employee is only required to demonstrate a prima facie case that the termination of employment or wrongful dismissal was unfair or unlawful for the burden to shift to the employer.

28. In the instant case, even according the Claimant the benefit of the doubt, it is unclear to the Court as to when the alleged termination of employment took place.

29. There is neither evidence of a date on when the separation took place nor the circumstances in which it took place.

#### **Was it on the date they were arrested or thereafter?**

30. The Court is left wondering whether the absence of dates was by default or by design bearing in mind that the alleged termination of employment took place on an unidentified date and the suit was filed in 2024.

31. Whether the alleged termination of employment took place on the alleged date of arrest on 26<sup>th</sup> March, 2021 or thereafter is unclear for want of particulars.

#### **If the termination of employment took thereafter, when was it and how did it occur?**

32. It is trite that an arrest by the police or being charged in a Court of law does not of itself terminate a contract of employment.

33. Similarly, the provisions of Section 107, 108 and 109 of the *Evidence Act* are explicit on the burden of proof, he who alleges bears the burden of proving the allegations.

34. From the evidence on record, it is the finding of this Court that the Claimant has failed to prove on a balance of probabilities that the termination of the grievants employment was unfair or unlawful.

35. As to whether the instance suit is statute barred, it is trite that since the issue of limitation implicates the Court's jurisdiction, which is everything as exquisitely captured by Nyarangi JA in his often cited



- rendition in *The Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd* [1989] KLR, it can not only be raised by either party to suit but the Court may also do so suo motu.
36. See *Aliaza V Samuel Kisiavuki* [2021] eKLR, *Nasra Ibrahim Ibren V Independent Electoral and Boundaries Commission & 2 Others Petition No. 19 of 2018*, *South Nyanza Sugar Co. Ltd V Margaret Akinyi Achola* [2023] KEHC 26659 (KLR) among others.
  37. The Supreme Court decision in the *Nasra Ibrahim* case (Supra) puts the issue to rest. That the Court can suo motu raise a jurisdictional issue and determine it.
  38. In this case, it is not in contest although the grievant testified that the arrest at Mr. Hassanoor's office happened on 26<sup>th</sup> March, 2021 after he and a colleague were summoned there, the copy of the charge sheet the Claimant availed as evidence reveals that the arrest took place on 7<sup>th</sup> March, 2021 and the grievant was charged on 8<sup>th</sup> March, 2021.
  39. It is unclear to the Court whether the grievant was arrested again on 26<sup>th</sup> March, 2021 and charged. This is compounded by the fact that the charge sheet states that the grievant and one Cleophas were in custody and were released on a cash bail of Kshs.20,000.00 and the trial Magistrate did not vary the terms. It would appear that the grievants were released from custody.
  40. In the criminal case, the grievants testified that, they were summoned for a meeting on an undisclosed date and were arrested on the same day when Mr. Hassanoor called the police.
  41. It is deducible, the arrest took place as the charge sheet produced by the Claimant states as no other has been provided.
  42. Regrettably, the grievant adduced no evidence of having returned to the work place after being released on cash bail or after they were acquitted.
  43. Equally, no evidence was adduced from which the Court could infer any dealings between the grievant and the employer after the arrest.
  44. Assuming that the arrest on 7<sup>th</sup> March, 2021 marked the end of the employment relationship and the instant suit was filed on 28<sup>th</sup> March, 2024 the suit was filed after 3 years.

Section 89 of the *Employment Act* provides that;

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 after the act, neglected or default complained, or in the case of continuing injury on damage within twelve months next after the cessation thereof.

45. Since time starts running from the time the cause of action arises or accrues and the grievant herein could have sued on any date after he was freed on cash bail but did not until 28<sup>th</sup> March, 2024 more than 3 years later, the instant suit is statute barred and the Court so finds.
46. The foregoing finding is consistent with the grievants reluctance to disclose the date of the alleged termination of employment and testimony that he was arrested on 26<sup>th</sup> March, 2021 while the charge sheet he provided as evidence has a different date.
47. The reason and place of arrest is also different. In the Court's view, the charge sheet is more credible than the grievant's testimony.



48. It is trite law that a Court of law has no jurisdiction to hear and determine a statute barred suit as it is in this instance.
49. Consequently, the Court hereby downs its tools and strikes out the Claimant's case for want of jurisdiction.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

