



**Abdikeir & 2 others v Muslim World League & another (Cause E642 of 2020)
[2024] KEELRC 13217 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13217 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E642 OF 2020
NJ ABUODHA, J
NOVEMBER 21, 2024**

BETWEEN

**MOHAMMED ABDIKEIR 1ST CLAIMANT
MOHAMMAD SHAMSUL ISLAM 2ND CLAIMANT
ADAN SHEIKH HUSSEIN HERSI 3RD CLAIMANT**

AND

**MUSLIM WORLD LEAGUE 1ST RESPONDENT
INTERNATIONAL ORGANIZATION FOR RELIEF & WELFARE
DEVELOPMENT 2ND RESPONDENT**

JUDGMENT

1. The Claimants through their Statement of Claim dated 5th October, 2020 pleaded inter alia as follows: -
 - a. The 1st Respondent vide a letter dated 1st February 1982 offered the 1st Claimant an appointment as a preacher in Kenya which the Claimant took up on the terms: basic salary of 2,400 Saudi Riyals, Annual House allowance equivalent to 3 months salaries, 30 days annual leave.
 - b. The 1st Respondent vide a letter dated 1st February, 1982 offered the 2nd Claimant an appointment as a preacher in Kenya which the Claimant took up on the terms: basic salary of 1,500 Saudi Riyals, Annual House allowance equivalent to 3 months salaries, 45 days annual leave and not more than 4 members annual return ticket to his home country.
 - c. The 1st Respondent on 12th July 1982 offered the 3rd Claimant an appointment as a preacher in Djibouti which the Claimant took up on the terms: basic salary of 1,500 Saudi Riyals, Annual House allowance equivalent to 3 months salaries, 45 days annual leave.



- d. The Claimants averred that the 3rd Claimant was thereafter transferred to Somalia then to Kenya in 1992 when civil war broke in somalia in the same terms.
 - e. The Claimants averred that the Claimants have since then dutifully served the 1st Respondent as preachers in Kenya for more than three decades. That they had legitimate expectation that the 1st Respondent would respect and uphold the terms of their employment contract as preachers in Kenya, honour and uphold their rights to the full application of the constitution and the laws of Kenya particularly the labour laws.
 - f. The Claimants averred that the 1st Respondent illegally failed and neglected to pay the claimant's House Allowance in the pretext that they were in their home countries. That the 1st Respondent transferred the Claimants to a new outfit, the 2nd Respondent which was both illegal and against contracts with the 1st Respondent.
 - g. The Claimants averred that the 1st Respondent was in breach of their contract by failing to pay their salary in full and effecting illegal deductions, failure to pay their leave allowance for years worked, failure to pay their house allowance as stipulated, failure to pay the 2nd Claimant annual return ticket with 4 members of his family for the number of years worked and failure to pay them one-month salary in lieu of notice. That as a consequence of Respondents' actions they suffered prejudice and oppression as preachers in Kenya.
2. The Claimants in the upshot prayed for the following against the Respondents;

1st Claimant

- a. Salary deductions for 37 yearsKshs 12,710,700/=
 - b. Leave allowance 37 years.....Kshs 3,768,173/=
 - c. House Allowance for 37 years.....Kshs 7,536,375/=
 - d. Service pay 37 years worked..... Kshs 2,637,724/=
 - e. Salary in lieu of notice.....Kshs 72,500/=
 - f. Damages of 1 year salary.....Kshs 870,000/=
- TOTAL KSHS 27,595,477/=

2nd Claimant

- a. Salary deductions for 38 yearsKshs 2,714,400/=
 - b. Leave allowance 38 years.....Kshs 3,817,125/=
 - c. House Allowance for 38 years.....Kshs 5,089,500/=
 - d. Annual ticket for 4 family members for 38 years...Kshs 24,624,000/=
 - e. Ticket to home country with 4 family members upon end of contractKshs 648,000/=
 - f. Service pay 38 years worked..... Kshs 1,781,325/=
 - g. Salary in lieu of notice.....Kshs 43,500/=
 - h. Damages of 1 year salary.....Kshs 522,000/=
- Total KSHS 39,239,850/=



3rd Claimant

- a. Salary deductions for 28 yearsKshs 14,885,700/=
 - b. Leave allowance 28 years.....Kshs 4,541,400/=
 - c. House Allowance for 28 years.....Kshs 6,055,200/=
 - d. Service pay 28 years worked..... Kshs 2,119,320/=
 - e. Salary in lieu of notice.....Kshs 69,600/=
 - f. Damages of 1 year salary.....Kshs 835,200/=
- TOTAL KSHS 27,906,420/=

3. The Claimants jointly prayed that the Claimants be awarded cost of the suit and interest on the 1st, 2nd and 3rd Claimants claim.
4. The Respondents filed their Memorandum of Defence dated 28th January 2021 and averred inter alia as follows;
 - a. The Respondents disputed the jurisdiction of this court as the respective party contracts have governing laws and jurisdiction clauses as the courts of the Kingdom of Saudi Arabia and cannot be subjected to Kenyan law on employment.
 - b. The Respondents averred that the 1st and 2nd Respondents were non-profit International non-governmental Islamic organization fully dependent on donor and well-wisher funding for its operations.
 - c. The Respondents averred that prior to the Claimants' engagements with the Respondents, they were Islamic scholars at the Islamic University of Madinah and after completion of their studies they were engaged and posted with others not party by the 1st Respondent as volunteer preachers in various East Africa Countries and later sent to Kenya.
 - d. The Respondents averred that the scope of the Claimants work included providing Islamic teachings and training to the local community through preaching at the mosque and other for a in different parts of the country. That the nature of their engagements with the Claimants was such that as a consideration of their volunteer work, they were to be supported monthly with a stipend/ token of appreciation and parties agreed to be paid out in a lump sum when funds would be available usually quarterly.
 - e. The Respondents averred that the Claimants were required to provide periodic reports of the work done every year which informed amount of stipend to be paid. That if it appeared that the standards of some teachers were below the set standards, then their stipend would be reduced or the teacher suspended in accordance with the contract.
 - f. The Respondents averred that although it was agreed that the 2nd Claimant would be entitled to travel tickets to his home country, the same was subject to request which was not made. That this was a benefit which could accrue on need basis.
 - g. The Respondents averred that the Claimants were always granted annual leave days as and when requested and any leave days earned and not taken properly computed and paid out as per the final settlement made on 14th March 2020. That the House Allowance was incorporated and duly paid out in the lump sum stipends paid out to the Claimants.



- h. The Respondents averred that on 1st May,2017 the 1st Respondent affected a transfer of supervisory powers over the Claimants to its affiliate organization the 2nd Respondent herein. That the 2nd Respondent was responsible of supervising the Claimants together with other teachers on their duties. That the Claimants were issued with letters of transfer to the 2nd Respondent stipulating new terms which they signed indicating acceptance and they provided documents necessary to effect the transfer.
- i. The Respondents averred that the transfer to the 2nd Respondent did not affect the Claimants' job status and or benefits.
- j. The Respondents averred that the Claimants were formally released by the 2nd Respondent on 1st January 2020 and paid all final dues which they acknowledged receiving on 14/3/2020 by signing the release agreement thus voluntarily agreed to indemnify the Respondents and any affiliate organization of future liabilities. That the Claimants cannot approbate and reprobate.
- k. The Respondents prayed for the Claimants' claim to be dismissed for want of jurisdiction with cost to the Respondents.

Evidence

- 5. The Claimants' case was heard first on 28th September,2023 in absence of Respondents' advocates where the Claimants called two witnesses, the 2nd Claimant (CW1) and 1st Claimant (CW2). CW1 testified in court where he adopted his witness statement together with the documents filed in court dated 27th September, 2022 as his evidence in chief.
- 6. CW1 testified that he was employed in 1982 about 34 years old and was initially employed by the 1st Respondent. That he was paid salary and house allowance and entitled to a ticket back home which he was given only once and that he never went for leave and his salary was reduced.
- 7. CW1 testified that he worked until 2018 January and thereafter transferred to the 2nd Respondent and he worked for 2 years. That the working condition was not good upon transfer and in March 2020 they had a meeting and they were paid their outstanding salaries for 2 years which he signed and received. That he was forced to sign the discharge voucher upon payment.
- 8. The Claimants' second witness CW2 was heard on 29/11/2023 where he testified and he adopted his witness statement dated 5/10/2020 and documents filed in court as his evidence in chief.
- 9. CW2 testified that he worked for the Respondent from 1983 and his monthly salary was paid in 2400 Riyals and 3 months equivalent of salary as house allowance and 200 Riyals transport allowance. That he was not entitled to ticket home being Kenyan.
- 10. CW2 testified that after 3 years of employment the Respondent said his salary was too high and it reduced the same. That the 1st Respondent told them that the 2nd Respondent was responsible for their salary where they were transferred to the 2nd Respondent. That he knew the 2nd Respondent very well as he assisted in establishing their offices in Westlands.
- 11. CW2 testified that they worked for the 2nd Respondent until 2020 and the 2nd Respondent paid their salary arrears and said those were their final dues. He therefore sought to be paid/ compensated for the years he worked.
- 12. In Cross-examination CW2 confirmed that there was initially no office for the Respondent in Kenya but they worked under Embassy of Saudia and that there was no dispute resolution mechanism in the contracts and Saudi never allowed lodging of disputes by foreigners. That they were told in the event of



- dispute to complain to the 2nd Respondent office. Their payment was from Saudia and did not know if tax were deducted.
13. CW2 confirmed that he was employed as a teacher on permanent basis as per signed contract and was not a volunteer. That he signed for his salary arrears which had delayed for long and they were not claiming salary arrears but their service.
 14. In re-examination, CW2 Clarified that they were Kenyans that is why they filed the case in Kenya and Saudi Arabia government would not allow them to file a case there.
 15. The Respondent on the other hand called one witness Dr. Hassan Idris (RW1) the director of the 2nd Respondent who testified in court on the 16th May, 2024.
 16. RW1 testified that the 2nd Respondent, a Humanitarian Relief Organization was based in Saudi Arabia and that the Claimants were volunteer preachers recruited in Saudi Arabia and payment was in Saudi currency which depended on donors as a token for work done. RW1 relied on the bundle of his documents as his evidence in chief.
 17. RW1 testified that the Claimants were paid either quarterly or annually and tickets were given upon request and they did not receive any request. That everything was governed by Saudi Law and disputes were to be resolved in accordance with Saudi Law.
 18. RW1 testified that the Respondent was not responsible for NSSF and NHIF contributions. RW1 adopted his witness statement as his evidence in chief.
 19. In Cross-examination RW1 confirmed that the 1st and 2nd Respondents are related and perform same functions but they are two separate entities.
 20. RW1 confirmed that the 1st Claimant was stated to be entitled to 1,500 Riyals and that he was paid a token or stipend and not salary. That he was also entitled to house allowance. There was a termination clause in the contracts which had outlined the reasons for termination. The Claimant did not have to be in office all the time.
 21. RW1 stated that the Claimants were transferred to the 2nd Respondent on 1st May, 2017 and were not issued with new contracts. That they worked for around three years and that they were paid token and salaries upon termination. The token was salary arrears.
 22. RW1 further stated that the Claimants were issued with notice of termination but the said the letters were not before the court and further that they were issued with release letters where the Respondent called them to the office and explained to them end of their contract and they signed the letters.

Claimants' Submissions

23. The Claimants' Advocates NML Advocates LLP, filed written submissions dated 30th May, 2024. On the issue of whether the court has jurisdiction to hear and determine the claim; Counsel submitted that the Respondents' the objection was unmerited and that this Honourable Court enjoyed jurisdiction to hear and determine the suit.
24. Counsel submitted that the contract was between the Claimants and the 1st Respondent only. Hence, if even such jurisdictional clause was to be enforceable, which was not, the same would not bind the Claimants and the 2nd Respondent.
25. Counsel submitted that DW-1 during cross examination admitted that the contract containing ouster clause was between the Claimants and the 1st Respondent and there was no written contract of



- employment between the Claimants and the 2nd Respondent hence there can be no clause in the engagement between the Claimants and the 2nd Respondents ousting jurisdiction.
26. Counsel submitted that the clause referred to in contract of employment executed between the Claimants and 1st Respondent was not enforceable as the employment contract between parties such as one herein could not oust the jurisdiction of the court which was firmly donated by the provision of the article 162(2) of *the Constitution* of Kenya and the *Employment Act*, 2007. That this court has inherent and constitutionally protected jurisdiction to hear and determine employment disputes as this one and counsel relied on the case of John Wanguhu v Sustainet Group Limited (Cause E085 of 2021) on this assertion.
 27. Counsel submitted that courts have held that though such clauses are lawful and enforceable the courts have to override them when the circumstances of the case demand.
 28. Counsel relied on the case of United India Insurance Co Ltd v East African Underwriters (K) Ltd [1985] KLR 998 while submitting that the onus of establishing a strong reason for avoiding the jurisdiction is upon the parties who seek to avoid that jurisdiction and the Court must take into account a number of factors like the country evidence is situated, or readily available and the convenience and expense of trial between the two countries among others.
 29. Counsel submitted that the circumstances of the claim warrant the court to override such a jurisdiction ouster clause as CW-1 indicated to court the hardship and impossibility of lodging the claim in the Saudi Arabia and the Respondents being state owned agencies, suing the Respondents amounted to suing the Monarch which was not tenable.
 30. Counsel submitted that all parties resided in Kenya, the evidence in the dispute are in Kenya, the contract was performed in Kenya for decades and the Respondents have their offices in Kenya. The Claimants of whom one is now deceased are elderly people who will have to extreme difficulties and hardship attempting to seek justice in Saudi Arabia and there will be no prejudice suffered by Respondent if the case is determined by this Honourable Court which is already heard.
 31. On the issue of whether the Claimants were employees of the Respondents, Counsel submitted that from the contracts signed between the Claimants and the 1st Respondent, there can be no doubt that the Claimants were employees and not volunteers as suggested by the Respondents. They were entitled to benefits that only accrue to employees while relying on section 2 of the *Employment Act*.
 32. On the issue of whether the procedure for ending the Claimants' employment was lawful and fair, counsel submitted that the Claimants pleaded that before their unceremonious dismissal in year 2020; they were unlawfully offloaded from the 1st Respondent to the 2nd Respondent in year 2018 and worked without any pay for the two years preceding their dismissal. As such being financially incapacitated, they were made to sign acknowledgment letters as condition precedent for them receiving their salary arrears.
 33. Counsel submitted that the act of withholding salaries for about 2 years knowing that the Claimants solely depended on that job was in itself gross and flagrant violation of their labour rights. That the act of paying the Claimants salaries on condition that they sign acknowledgment letters cannot absolve the Respondents of the liability of violating the Claimants' labour rights and that the Claimants signed the said acknowledgment letters under economic duress and coercion.
 34. Counsel submitted that this court should find the Claimants were terminated in an unprocedural and callous manner against *the Constitution*, *Employment Act* and case law.



35. On the issue of whether the Claimants are entitled to any of the reliefs sought in the claim, Counsel submitted that it was the Claimants' case that upon being employed by the 1st Respondent, their remuneration and benefits were reduced in the manner pleaded in the claim. The Claimants' salaries were unlawfully slashed for the entire period they worked for the Respondents and they earned less than what they had agreed. That the Claimants were entitled to the salary reductions, leave and house allowance. That the 2nd Claimant was entitled to annual ticket for the 4 family members back home.
36. Counsel submitted that the Claimants who never under any pension scheme hence entitled to service pay at 15 days salary for each year worked as per section 35(5) of the *Employment Act* having worked for 37,38 and 27 years respectively. That the Claimants were also entitled to one month salary in lieu of notice.
37. Counsel submitted that the Claimants were also entitled to damages upon the unfair termination to the maximum of the 12 months' salary due to the nature of how their termination was carried out, their age and the fact that they did not secure other jobs somewhere else after serving the Respondents for over three decades and were dismissed unceremoniously.

Respondent's Submissions

38. The Respondents' Advocates KJNO Advocates, LLP filed written submissions dated 12th June 2024. On the issue of whether this Honourable Court has the jurisdiction to hear and determine the claim counsel submitted that the contract between the parties expressly provided that all disputes arising between the parties be resolved in the Kingdom of Saudi Arabia. That this court cannot rewrite the contract between the parties. Counsel relied on parole evidence under section 97 as read with section 98 of the *Evidence Act*.
39. Counsel relied on among others the case of National Bank of Kenya v Pipelastic Samkolit (K) Ltd & Another and submitted that Court cannot re-write the contract between the parties. That the general rule was that where parties have bound themselves by an exclusive jurisdiction clause effect should be ordinarily be given to that obligation unless the party suing in the non- contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum. Counsel referred to the among others the case of United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd(1985) KLR 898.
40. Counsel submitted that the matter should be referred to the Kingdom of Saudi Arabia as per the terms of Contract between the Claimants and the Respondents as this court does not have jurisdiction to determine the dispute. That the Claimants should not be allowed to evade a dispute resolution process which they committed to under contract between the parties.
41. Counsel relied on among others the case of *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022)* [2023] KECA 80 (KLR) (3 February 2023) (Judgment) on lack of jurisdiction and submitted that jurisdiction is fundamental and it cannot be treated lightly.
42. On the issue of whether the Claimants were either employees or volunteers of the Respondent Counsel submitted that there is no employer-employee relationship due to the fact that the claimants were engaged as volunteers given tokens of appreciation sent as and when the funds were available and calculated on a monthly basis. They were not engaged full time and not subject to employee tax deductions such as PAYE, NSSF, NHIF and Courts cannot therefore deduce an employer-employee relationship where there was none existing.



43. Counsel relied on among others the case of Edward Ngarega Gacheru versus Nation Media Group Limited (2019) eKLR while submitting that complicated working relationships can only be adequately discerned by ‘sifting substance from form’.
44. Counsel submitted that Section 12(1)(a) of the *Employment and Labour Relations Court Act* only grants this Honourable Court the jurisdiction to determine disputes relating to or arising out of employment between an employer and an employee.
45. Counsel submitted that the Claimants vide a Release Agreement dated 14th March 2020, voluntarily and duly agreed to indemnify and the Respondents and any affiliate organization of any future liabilities and relied on the case of *Fina Bank Limited Vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000)* (unreported) while submitting that a party should not be allowed to escape a bad bargain.

Determination

46. The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and in opposition to the case and has as well considered the authorities relied on by Counsels. The court has come up with three main issues;
 - a. Aa. aa. Whether there was an employment relationship between the Claimants and the Respondents.
 - b. Whether this court has jurisdiction to hear and determine the claimants’ suit.
 - c. Whether the Claimants were unfairly terminated thus entitled to reliefs sought.

Whether there was an employment relationship between the Claimants and the Respondents

47. It is the Claimants’ case that through various letters of appointments dated 23/01/1983, 1/02/1982 and 12/07/1982, the 1st Respondent employed the 1st, 2nd and 3rd Claimants respectively as preachers in Kenya and Djibouti. On the other hand it is the Respondents’ case that the Claimants were not employees but volunteers.
48. A contract of service is defined in Section 2 of the *Employment Act* to mean an agreement, whether expressed or implied, to employ or to serve as an employee for a period of time; The Act defines an employee as a person employed for wages or a salary, and an employer as a person, public body, firm, corporation company who or which has entered into a contract of service to employ an individual.
49. There are contracts on record with duration of one year automatically renewed unless one of the parties in writing at the end of the contract, terminates the same two months before its end. The Claimants were entitled to certain privileges including salaries, House Allowance, leave and annual tickets back home.
50. The Court finds that the facts and evidence disclosed the existence of employment relationship between the parties. To sum up this issue the 2nd Respondent referred to the Claimants as teachers in their termination letters attached to their bundle of documents at pages 60,62 and 64. The letter at page 59 also transferred the Claimants from 1st Respondent to 2nd Respondent as teachers not volunteers.
Whether this court has jurisdiction to hear and determine the claimants’ suit.
51. The jurisdiction of the Employment and Labour Relations Court under section 12 of the *Employment and Labour Relations Court Act* as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further.



52. It is not disputed that clause 10 of the contract provides that every dispute arising in the implementation or change of the contract is subject to the jurisdiction of the courts of the Kingdom of Saudi Arabia. This clause did not provide for the applicable law in the event of termination.
53. Courts in this land have made decisions that choice of law does not necessarily mean choice of jurisdiction. In *Dorcas Kemunto Wainaina v IPAS* [2018] eKLR, Radido J held that: -
23. Although the question of jurisdiction is connected to the issue of choice of law, the two are conceptually distinct.
 24. In other words, question of application of foreign law may be irrelevant to the question of jurisdiction in certain instances.
 25. For instance, an employment contract may be governed by the law of the United states but the Employment and Labour Relations Court of Kenya would have jurisdiction to arbitrate in disputes alleging breach of contract, but applying the law of United States where the parties have expressly agreed so, or where the court after assessment of the connecting or dominant features and the law assumes jurisdiction.
 26. It needs no authority therefore to state that a domestic court may be called upon to apply foreign law in a contractual situation as obtain herein. The distinction in simple terms is on choice of jurisdiction and choice of law.”
54. The court is persuaded by the foregoing decision to the extent that what the parties chose in this case was only the law applicable to their employment contract in respect to disputes and implementation and change of the contracts but not the jurisdiction on termination.
55. Even if the parties had expressly conferred jurisdiction to a foreign court, this court still has discretion to assume jurisdiction if there is a strong reason for overriding the jurisdiction clause in the contract. In *United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd* [1985] KLR 998, the Court of Appeal held that:
- “The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction. Jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is a strong reason for not keeping the bound by their agreement.”
56. The Court of Appeal then went ahead to set out the principles to be considered before local court exercises discretion to assume jurisdiction and thus:-
- (a) in exercising its discretion the court should take into account all the circumstances of the particular case;
 - (b) in particular, but without prejudice to (a), the following matters, where they arise, may properly be regarded:-
 - (i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expenses of trial as between the court of the country and the court of foreign country;



- (ii) whether the law of the foreign Court applies, and if so, whether it differs from the law of the country in any material respects;
- (iii) with what country either party is connected, and how closely.
- (iv) whether the defendant genuinely desire trial in the foreign country or are only seeking procedural advantage; (v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.”

57. Applying the facts of this case to the Court of Appeal decision in the aforementioned case, this court finds that it is the natural forum connected to the dispute herein. The reasons being that:-

- (a) The contracts were performed in Kenya.
- (b) The Claimants were and are resident in Nairobi Kenya while the 1st and 2nd respondent has a regional office in Nairobi.
- (c) The alleged misconduct and breaches leading to the suit herein took place in Kenya
- (d) Referring to the suit to Saudi Arabia will add to expenses of the trial in travel costs for Claimants and witnesses from Kenya to the foreign court. The court also considers their old age and the fact that the 3rd Claimant is now deceased.
- (e) Brining a foreign decree to Kenya for execution faced a possibility of rejection or challenge that may result to injustice to the Claimants.
- (f) The Claimants enjoyed protection of Kenyan Employment Law under the international Law.

58. Consequently, this court finds that there is a strong reason shown to warrant this court exercise discretion to assume jurisdiction over this dispute.

Whether the Claimants were unfairly terminated thus entitled to reliefs sought.

59. The Court finds that since the Claimants were employees of the 1st Respondent for decades before they transferred to the 2nd Respondent and who the Respondents witness stated were related. They therefore deserved fair treatment upon termination.

60. The court also notes that the 2nd Respondent failed to issue contracts to the Claimants upon transfer hence it can be assumed the same terms applied as per the initial contracts between the 1st Respondent and Claimants as per the transfer letter.

61. The Respondents have also alleged that the Claimants were paid final dues and signed release letters in March,2020. This court notes that the Claimants who were terminated in January 2020 without pay for two years signed the release letters in order to be paid their salary arrears. The Respondents duped them as final dues when in real sense there was no specific dues stipulated therein. The same was under economic duress and cannot be enforceable before this court.

62. The court further notes that the Respondents’ actions amounted to unfair termination after serving for many decades. However, the Claimants only seek from court the compensation for years worked, Salary deductions, leave allowances, house allowances and annual ticket and salary in lieu of notice among others and not the salary arrears.



63. On the issues as claimed by the Claimants on their statement of claim, the court notes that this being an employment dispute, the applicable law on limitation of actions is governed by section 90 of the [Employment Act](#) which provides as follows:-

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.

64. The court further notes that Section 90 of the [Employment Act](#) leads to the conclusion that the cause of action starts running after cessation of the contract. In this case the employer-employee relationship ended on 1/1/2020 when the contract ended.

65. The second part of section 90 of the Act provides that in the case of continuing injury or damage, a claim must be brought within twelve months next after the cessation thereof. Section 90 of the Act is framed in mandatory terms.

66. The court of Appeal contextualised what constitutes continuing injury in *G4S Security Services (K) Limited v Joseph Kamau & 468 Ors* (2018) eKLR and held that a contractual benefit which accrues at the end of each month amounts to continuing injury for purposes of the law of limitation.

67. Consequently, this Court finds that the dues sought by the Claimant under the head of service pay was a continuing injury therefore they should have moved the Court within 12 months as at 1st January 2021. This court notes that the Claimants filed their claim dated 5th October, 2020 which was within 12 months as per the Act. The claim therefore succeeds as per section 35 (5) of the [Employment Act](#).

68. The court finds that having been in service the claimants were entitled to service pay for those years when they were in employment and were not under NSSF scheme. Their statutory dues were not paid to the NSSF and they are thus entitled to claim service pay.

69. On the claims for salary reductions, house allowance and leave allowance the same can only be allowed three years after filing the claim as per limitations of the three- year period under section 90 of the Act. Since the Claimants were terminated in January,2020 and filed in October,2020 and they were not working in 2020 they can only claim for 2019 and 2018 as a remainder of the three-year period.

70. In the case of *Charles Muthusi Mutua v Kathi No Kakoka Services Limited* [2022] eKLR the court had this to say:-

Bearing in mind the provisions of Section 90 of the [Employment Act](#), I can only grant untaken unpaid for leave days for the three years preceding the date of filing this claim. Not the five years sought by the claimant. Therefore, Kshs. 27,844.50. Leave to employees is a statutory entitlement, and an obligation on the employer to ensure that the right is realized, under section 28 of the [Employment Act](#). Where an employee alleges that he did not enjoy this right during the currency of the employment fully or to a certain extent, then it behoves the employer to disabuse the allegation by tendering evidence before the trier. The Respondent as the employer didn't.



71. On house allowance whereas it is an entitlement under section 31 of the Act the court also observed in Paul Mwasatu Maganga & 2 others v G4S Kenya Limited [2015] eKLR that;

The first claimant is awarded house allowance for the 3 years immediately before filing of the suit in line with the time bar constructed by Section 90 of the E A. The said Section limits the time for lodging suit in respect of a right under the Act to 3 years.

72. On notice pay, the Claimants are entitled to the same since they were not given notice of termination which the Respondents' witnesses acknowledged and that they were never availed in court. This is an entitlement under section 36 of the *Employment Act*.

73. On Annual tickets, the court finds that the same was subject to request which was not made by the 2nd Claimant. This claim fails.

74. On the claim for compensation for unfair termination this court having found the actions of the Respondents amounted to unfair termination the Claimants are entitled to damages for the unfair termination as per section 49(1) (c) of the *Employment Act*. The court is guided by the considerations stipulated under section 49(4) of the act and takes in to account the years the Claimants served the Respondents which was over three decades, the Claimants may not secure any job anywhere. Taking the foregoing considerations, the deems it reasonable to award the Claimants maximum compensation of 12 months' salary.

75. In conclusion the Claimant's claim is hereby allowed with costs as follows;

1st Claimant

- a) Salary deductions for 2 yearsKshs 687,064/=
 - b) Leave allowance 2 years.....Kshs 203,685/=
 - c)House Allowance for 2 years.....Kshs 407,371/=
 - d) Service pay 37 years worked..... Kshs 2,637,724/=
 - g. Salary in lieu of notice.....Kshs 72,500/=
 - h. Damages of 1 year salary.....NIL
- TOTAL KSHS 4,008,344/=

2nd Claimant

- i. Salary deductions for 2 years Kshs 142,863/=
- j. Leave allowance 2 years..... Kshs 200,901/=
- k. House Allowance for 2 years..... Kshs 267,868/=
- l. Annual ticket for 4 family members for 38 years...NIL
- m. Ticket to home country with 4 family members upon end of contractNIL
- n. Service pay 38 years worked..... Kshs 1,781,325/=
- o. Salary in lieu of notice.....Kshs 43,500/=
- p. Damages of 1 year salary.....522,000/=



TOTAL KSHS 2,958,457/=

3rd Claimant

- g. Salary deductions for 2 yearsKshs 1,063,264/=
- h. Leave allowance 2 years.....Kshs 324,385/=
- i. House Allowance for 2 years.....Kshs 432,514/=
- j. Service pay 28 years worked..... Kshs 2,119,320/=
- k. Salary in lieu of notice.....Kshs 69,600/=
- l. Damages of 1 year salary.....Kshs 835,200/=

TOTAL KSHS 4,844,283/=

76. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

