



**Obwogon v Marula Estate (Cause 82 of 2017)
[2024] KEELRC 13592 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13592 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 82 OF 2017
DN NDERITU, J
DECEMBER 19, 2024**

BETWEEN

MOSES EIPA OBWOGON CLAIMANT

AND

MARULA ESTATE RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 17th January, 2017 filed in court on 28th February, 2017 through Mboga G.G. & Co. Advocates. The claimant prays for a declaration that the termination was unfair and unlawful and that the respondent should be compelled to compensate him in the following –

- a. Leave accrued five years (5) (5x6000)Ksh30,000/=
- b. Underpayments
- c. 3 months’ notice pay@Kshs8000/=
- d. Overtime allowance
(3 1/2 hours daily 3.5hrs x 7=24.5 hrs a week
(24.5 x 300)2400x 300) +150Kshs7,350/=
- e. Compensation for unlawful dismissal
(8,000 x 12months).Kshs76,100/=
- f. House allowance (48 months 2008-2013)
(15% of 8,000) x48) Kshs21,600/=



- g. A declaration that the termination of employment of the claimant is contrary to the [Employment Act](#)
 - h. Breach of contract (8000x 12)..... Kshs76,000/=
 - Total = Kshs302,050/=
2. Together with the memorandum of claim was filed a verifying affidavit, a list of witnesses, the claimant's written statement, a list of documents, and a copy of the listed document in support of the claim.
 3. On 10th March, 2016 the respondent entered appearance through Kagucia & Co. Advocates and subsequently filed an answer to the claim dated 16th May, 2017. In the answer to claim, the respondent prays that the claimant's cause be dismissed with costs for want of merits.
 4. Alongside the answer to the claim, the respondent filed a list of documents dated 18th May, 2017, a bundle of copies of the listed documents, a list of witnesses, and the written statement of Faith Wanza Kioko dated 20th May, 2017 in support of the answer to the claim.
 5. On 11th October, 2017 the respondent filed its list of issues dated 10th October, 2017 but subsequently on 30th October, 2017 the parties filed an agreed list of issues dated 28th October, 2017.
 6. The cause had been dismissed for want of prosecution on 14th October, 2021 but on 5th October, 2023 the court reinstated the cause for hearing on merit upon hearing the claimant's application for reinstatement dated 15th November, 2022.
 7. The claimant's case came up in court for virtual hearing on 14th November, 2023 when the claimant (CW1) testified and closed his case.
 8. On 28th November, 2023 the respondent filed a list of witnesses of even date and a witness statement by Edward Ominde Ngala (RW1) substituting that of Faith Wanza Kioko.
 9. The defence was heard on 29th November, 2023 when RW1 testified virtually and the respondent's case was closed.
 10. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Miss Kirui, filed her submissions on 16th January, 2024 while counsel for the respondent, Miss Njoki, filed her submissions on 16th February, 2024.

II. The Claimant's Case

11. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence by the claimant, and the written submissions by his counsel.
12. In his testimony in court, the claimant adopted his filed witness statement on record as his evidence-in-chief and stated that he was engaged by the respondent from 2008 to 2013, initially as a guard earning Kshs5,000/= a month, and subsequently as a herder and milk-boy earning a monthly salary of Kshs6,000/=.
13. He testified that he only took 14 days' leave each in 2009 and 2010. He further testified that his salary was paid in cash and no duty roster or attendance book was availed for signing. He testified that he had no off-days and worked during public holidays. He testified that he was summoned to the office and dismissed without a reason, notice, or a hearing. He testified that he was also kicked out of the house provided to him by the respondent. He testified that he was not paid any terminal dues on 25th September, 2013.



14. On cross-examination, he testified that he did not abscond work in September, 2013, but rather that he had worked for several days before he was dismissed mid-month. He testified that his monthly salary at dismissal was Kshs6000/= and not Kshs8000/=. He further testified that he worked from 5.00 am to 6.00 pm. He testified that he took leave in September, 2013 and upon reporting back he was orally dismissed after being summoned to the office.
15. In re-examination he testified that he did not on leave in 2013.
16. It is on the basis of the foregoing that the claimant pleads and prays that the dismissal was wrongful and seeks for the reliefs set out in the introductory part of this judgment.

III. The Respondent's Case

17. The respondent's case is contained in the answer to claim, the oral and documentary evidence adduced through RW1, the head of human resources, and the written submissions by its counsel.
18. In his testimony in court RW1 stated that the claimant took leave from 6th August, 2013 to 1st September, 2013 and on resuming duty, worked up to 20th September, 2013 when he absconded. He stated that the claimant returned on 25th September, 2013 to collect his terminal dues. He stated that the terminal dues were paid as per the pay slip (C-Exh-3) in the tune of Kshs8,800/= and included Kshs5,670/= as the basic pay wages for days worked in September, 2013, and overtime.
19. He testified that the claimant worked from 6.00 am to 6.pm for 10 hours and two hours were paid as overtime. He testified that the claimant was housed at the farm and that he deserted duty without notice. He testified further that no demand notice was served upon the respondent as the one produced in court was not received by the respondent. He stated that the claimant was not terminated but his terminal dues were paid after he absconded.
20. In cross-examination, RW1 testified that he did not know the claimant personally but, as per the records, the claimant was engaged as a cattle herder and not as a milker. He testified that the claimant worked from 6.00 am to 6.00 pm and conceded that the claimant had not signed the attendance sheets. He testified that he had no leave records only the muster roll, but insisted that the claimant took all his leave days. He testified that he had no proof that the claimant was paid for overtime for the years worked, as he only had the pay-slips for August and September, 2013. He conceded that he was unaware whether the claimant received the stated pay-slips although he stated that the claimant was paid his terminal dues in cash.
21. In re-examination, RW1 stated that he was employed in June, 2020 after the claimant had left employment and stated that the claimant had failed to notify the respondent of his absence.

IV. Submissions By Counsel

22. On the one hand, the claimant's counsel submitted on two issues – Whether there was termination of the employment of the claimant; and, Whether the said termination was wrongful, unfair and unlawful.
23. It is submitted that the claimant was employed by the respondent from February, 2008 to September, 2013 when he was terminated without notice. It is submitted that four days before he was dismissed, the claimant had gone to help a colleague save a drowning cow from a dam. It is submitted that he reported back to work and after three days he was summoned by the human resource manager and questioned about his absence from work. It is submitted that he was told to go home and on reporting the next day he was stopped at the gate and informed that he had been fired. It is submitted that the



- claimant went to the staff residence but he was informed on the same day to leave the premises without prior notice.
24. It is submitted that contrary to the evidence by RW1 that the claimant deserted work and returned to collect his terminal dues, the pay-slips produced did not bear the claimant's signature that he had been paid. It is further submitted that RW1's evidence is inconsistent, bearing in mind that according to the muster roll (R-Exh-5), the claimant had allegedly been absent for 22 days, yet RW1 testified that the claimant was on leave from 6th August, 2013 to 1st September, 2013, which is 27 days. It is submitted that the respondent's pay-slips (R-Exh-3 & 4), the petty-cash voucher (R-Exh-2), the August and September, 2013 muster roll (R-Exh-5), and the attendance register for August, 2013 (R-Exh-1) are not credible or admissible as they were not signed by the claimant and contain inconsistencies.
 25. Citing *Muga Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer & 2 others)* (2019) eKLR where the court found that unsigned documents had no probative value, it is submitted that the respondent's documents having not been signed by the claimant and in the absence of testimony by the makers, the evidence by RW1 was hearsay.
 26. It is submitted that in a bid to fabricate evidence, the respondents produced payslips for August and September, 2013 only, yet the claimant was always paid in cash with no pay-slips issued. The court is urged to find that the respondent's evidence to be no probative value.
 27. It is further submitted that no show-cause letter was served upon the claimant or any disciplinary hearing conducted to accord the claimant a chance to be heard. The court is urged to find that there was no substantive justification or procedural fairness in accord with Section 43 of the *Employment Act* (the Act).
 28. It is submitted that RW1 conceded that no action was taken or a hearing conducted after the claimant deserted duty. The court is urged to be persuaded by the reasoning in *Fancy Jeruto Cherop & another v Hotel Cathay Limited* (2018) eKLR where the court found that notice and a hearing before summary dismissal are mandatory in meeting the tenets of natural justice and in their absence an unfair labour practice arises. It is submitted that in the absence of procedural fairness, the claimant is entitled to compensation under Section 49 of the Act and notice pay under Section 35 of the Act.
 29. It is submitted that the claimant is entitled to earned annual leave pay for the 5 years that he worked for the respondent. Counsel invites the court to be guided by the reasoning in *Rajab Barasa & 4 others vs Kenya Meat Commission* (2016) eKLR and find that an employer must ensure that an employee takes annual leave or make payment in lieu thereof. It is submitted that the claimant worked during his off-days and on public holidays without compensation to which he is entitled to be compensated.
 30. It is further submitted that the claimant was underpaid as a guard earning Kshs5000/= below the minimum wage in 2008. It is submitted that after two years the claimant's salary was increased to Kshs6,000/=, a salary he was paid until dismissal, and which was below the minimum wage of Kshs7,430/=.
 31. On reliefs it is submitted that the claimant is entitled to accrued leave for five years notice pay salary at termination underpayments public holidays pay off-day pay compensation for unlawful dismissal house allowance and damages for breach of contract. The court is urged to find in favour of the claimant and award all these reliefs as prayed.
 32. On the other hand, counsel for the respondent identified the following issues for determination – Whether the claimant was dismissed from employment; and, Whether the reliefs sought by the claimant should be granted.



33. On the first issue, it is submitted that the claimant absconded duty from 20th September, 2013 until 25th September, 2013 an act of insubordination. It is submitted that the claimant was not dismissed. Citing *Ronald Nyambu Daudi v Tornado Carriers Limited (2019) eKLR* it is submitted that the desertion is a ground for summary dismissal. It is submitted that the claimant has not proved that he was unfairly or unlawfully terminated and thus no burden falls on the respondent to justify the alleged dismissal.
34. It is submitted that the evidentiary burden of proof lies with (s)he who alleges under Section 109 of the *Evidence Act* (Cap 80). It is further submitted that under Section 47(5) of the Act the Claimant bore the burden of proving that he was unfairly dismissed but he failed. To buttress this assertion counsel cited *Kennedy Maina Mirera v Barclays Bank of Kenya (2018) eKLR* where the court held that the claimant therein was to adduce prima facie evidence demonstrating that his termination was not based on valid reasons and that the employer had not followed proper procedure in terminating him.
35. On the second issue, it is submitted that the claimant terminated his own employment and he was paid his terminal dues as per the pay-slips entitled and the petty-cash voucher that he signed. It is submitted that the claimant was paid in cash but the pay was based on the pay-slips availed in court in accord with Section 17(1) of the Act. It is submitted that RW1 testified to the effect that employees worked from Monday to Saturday while Sundays and public holidays were off days. It is submitted that those who worked overtime were paid as evidenced in the claimant's pay-slips.
36. On the third issue, it is submitted that despite pleading for unpaid leave, the claimant testified that he took leave in 2009 and 2010. It is submitted that the claimant failed to prove that he was denied an opportunity to proceed on leave. It is submitted that the claimant's monthly salary was Kshs5,607/= and not Kshs8,000/= and, in any case, the allowable annual leave is 21 days rather than 30 days that the claimant relied on in his computation. It is submitted that the inconsistencies in the claimant's testimony point to fabrication and thus the claimant is not entitled to leave pay.
37. It is submitted that the claimant is not entitled to the claim for underpayments as the Regulation of Wages (Agricultural Industry) Order, 2013 provided for the wages of a stockman, herdsman, and watchman as Kshs5,606.05. It is submitted that the claimant's claim and submissions are marred with discrepancies and inconsistencies arising from duplication of reliefs sought and miscalculations. It is further submitted that the items on public holidays and off days were introduced in the submissions with no particulars. It is further submitted that the claimant's claim lacks adequate particulars and is thus incompetent.
38. It is submitted that the claimant is not entitled to three months' notice pay as Section 35(b) of the Act requires 28 days notice only and, in any event, the claimant having left employment on his own volition is not entitled to notice or pay in lieu thereof.
39. It is further submitted that the claimant was paid overtime allowance and his computation thereof is incomprehensible. It is submitted that the claimant is not entitled to 12 months salary in compensation as he deserted duty and, in any case, he did not prove that his salary was Kshs8,000/=. It is submitted that the claimant conceded that he was accommodated at the respondent's premises and thus he is not entitled to the claim for house allowance.
40. It is submitted that the alleged termination took place in September, 2013 and the present cause was filed on 28th February, 2017, three years and 5 months later. It is submitted that this cause is statute barred under Section 89 of the Act and ripe for dismissal. The court is urged to dismiss the cause with costs to the respondent.



V. Issues For Determination

22. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
 - a. Whether the claim by the claimant is time-barred;
 - b. Whether the claimant was dismissed or he deserted and absconded duty;
 - c. If (b) is in the affirmative, whether the dismissal was wrongful, unfair, and unlawful?
 - d. Is the claimant entitled to the reliefs sought? And,
 - e. Who meets the costs in this cause?

VI. Limitation Of Action

22. The issue of limitation in time goes to the jurisdiction of the Court. The issue that the cause is statute barred was raised in the submission by the respondent's counsel who submitted that the claimant's cause was filed three (3) years and five months after the alleged dismissal which is outside the timeline of three years provided for under Section 89 of the Act.
23. Section 89 of the Act (formerly Section 90) provides –

“89. Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act*, 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.” (Emphasis added).
22. A cause of action based on a contract of employment arises from the date of dismissal or termination. In the instant cause, the claimant testified that he was prevented from accessing the respondent's premises on 20th September, 2013 and hence he was effectively dismissed. This is the time that the cause of action arose and this day marked the beginning of the count-down to the three years statutory limitation period.
23. This cause was filed on 28th February, 2017 way outside the three years provided for by about five months and eight days. Clearly and evidently, the claimant filed his claim well outside the limitation period of three years and as such the court lacks jurisdiction to adjudicate over the matter. In fact, had this issue been raised from the onset the court ought to have downed its tools – see comments by Nyarangi J in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) eKLR.
24. Having found and held as above the court need not consider the other issues raised in the cause. For the foregoing reason, the cause is hereby dismissed for being time barred and stale.

VII. Costs

22. The court orders that each party shall meet own costs.

VIII. Disposal/orders

22. The court issues the following orders –



- a. The suit is dismissed for being statutory barred.
- b. Each party shall meet own costs.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 19TH DAY OF DECEMBER, 2024

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DAVID NDERITU
JUDGE

