



**Hezron v Neptune Hotels Limited (Cause E090 of 2022)
[2023] KEELRC 1662 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1662 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E090 OF 2022**

**M MBARŪ, J
JUNE 29, 2023**

BETWEEN

ANTHONY MACHI HEZRON CLAIMANT

AND

NEPTUNE HOTELS LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent on 1st March 1984 as a maintenance supervisor until 31 December 2021 when he retired while earning a salary of Kshs. 109,000 per month.
2. On 31 December 2021 when the claimant was due to retire, the respondent tabulated his terminal dues at Kshs. 4,375,366.67 for the 37 years of service based on his last salary of Kshs. 109,000 but he was only paid Kshs. 1,081,745 paid after various demands and a balance of Kshs. 3,295,621 remains unpaid.

The claim is for payment of the following dues;

- a. Kshs. 109,000 x 37 years at Kshs. 4,033,000 less paid Kshs. 1,081,745 at Kshs. 2,951,255;
 - b. Travelling allowance Kshs. 5,400 x 37 Kshs. 204,282;
 - c. Pending off days Kshs. 138,084;
Total Kshs. 3,293,621
 - d. Costs and interests on the unpaid dues.
3. The claimant testified that upon employment by the respondent, he worked diligently for 37 years starting at a wage off Kshs. 37,000 per month and due to good performance this increased over time lastly earning Kshs. 109,000 per month.



4. In December 2021 he retired after the respondent issued him with notice, certificate of service and KRA tax deductions. The respondent tabulated his terminal dues for the 37 years at Kshs. 4,375,366.67 but has only paid Kshs. 1,081,400 by instalments of;
 - 1st instalment of Kshs. 500,000;
 - 2nd instalment of Kshs. 250,000; and
 - 3rd instalment of Kshs. 250,000
5. Paid through his bank account at Co-operative bank and despite making demands for payment of the balances, the respondent has failed to oblige.
6. Upon cross-examination, the claimant testified that the respondent filed an Amended response but he has not filed a response thereto. He has not checked the Companies Registry to ascertain the nature of the respondent as a company but he is aware that he was working at Neptune Hotels and therefore did not necessarily to check the registrations.
7. He started working for the respondent from the year 1984 and for 37 years he remained at Holiday Resort part of the Neptune Resort. During the period of employment, he was deployed at Mara Rianta Limited where he asked to retire and he gave 3 months' notice on 1st October 2021 and in response, Mara Rianta Limited accepted the notice through letter dated 18 February 2022 which also issued the Certificate of Service and terminal dues tabulated at Kshs. 33,745 which was lower than he was entitled to. The cheque issued in payment was from Neptune Village and not Mara Rianta. Part of the monies paid was from a director of the respondent and the balance is owing.
8. In response, the respondent filed Response to the Claim on 27 January 2023 and an Amended Response to Claim on 16 February 2023.
9. The respondent's case is that the claimant worked for Holidays Resort Limited which trades under the names of Neptune Beach Resort and Neptune Village Beach Resort. He was unionised from the year 1984 to 31 October 2011 when paid a wage of Kshs. 37,000 per month. In November 2011 the claimant was employed by Mara Rianta Camp Limited as a maintenance engineer effect from 1st November 2011 on contract earning Kshs. 63,417 per month. The salary increased to Kshs. 109,000 and upon retirement the claimant was advised on his terminal dues through a letter dated 31 December 2021 which he received on 17 February 2022 and his dues were Kshs. 653,766 less Kshs. 182,021.26 in taxes and has been paid Kshs. 471,745 less advances of Kshs. 140,000 leaving a balance of Kshs. 331,745.40.
10. The tabulations by the claimant of Kshs. 4,375,366.67 for 37 years is not justified, the claimant has since accepted payment by Kshs. 33,745.41 and has no further claims against Mara Rianta Camp Limited. The claimant has since been given an ex gratia payment of Kshs. 1,000,000 which was paid in three instalments and his claims against the respondent are not justified and should be dismissed with costs.
11. In evidence, the respondent called Charity Githinji the human resource manager for the group of companies under Holiday Resort Limited trading as Neptune Limited and Mara Rianta Limited. The claimant was employed from 1st March 1984 to 31 October 2011 by the respondent and on 1st November 2011 he was employed by Mara Rianta Camp Limited. The contract was renewed on 1st January 2020 and salary increased to Kshs. 109,000 per month. The claimant voluntarily retired from his employment with Mara Rianta Limited on 31 December 2021 through his letter dated 1st October 2021 by giving 3 months' notice effective 31 December 2021.



12. On 17 February 2022 the claimant was taken through a tabulation of his terminal dues all at Kshs. 331,745.40 being;
- 38 leave days Kshs. 138,066;
 - 27 years of service Kshs. 499,500;
 - 3 years leave travelling allowance Kshs. 16,200
 - Total Kshs. 653,766
 - Less tax Kshs. 182,021
 - Due Kshs. 471,745.41
 - Less advances Kshs. 140,000
 - Total due Kshs. 331,745.40
13. This amount has since been paid together with Ksh.1,000000 in ex gratia. The claims made are without merit and should be dismissed with costs.
14. At the close of the hearing, both parties filed written submissions which are analysed and the single issue for determination is whether the claims made are with merit.
15. The claimant admitted that despite being served with Amended Response to Claim he did not reply.
16. The Amended Response has with it various records of employment including contract dated 1st November 2011 under which the claimant was employed by Mara Rianto Camp Limited as the Maintenance Engineer effective 1st November 2011 to 30 October 2012.
17. The claimant accepted this employment contract on 6 November 2011 and has signed in acceptance thereof.
18. Upon the lapse of the contract, on 3 January 2020 the claimant was appointed by Neptune Mararianta Camp Limited as the Maintenance Supervisor effective 1st January 2020 to 31 December 2020. He has signed the letter of appointment in acceptance.
19. There is no record of employment terms and conditions at the end of the contract ending 31 December 2020. On 1st October 2021 the claimant offered to retire and issued notice to Neptune Hotels.
20. The Certificate of Service dated 18 February 2022 is by Mara Rianta Camp Limited.
21. The payment of terminal dues of Kshs. 331,745.41 is through a cheque by Mararianta Camp Limited.
22. Records in employment and labour relations disputes are imperative and should be produced by the employer pursuant to Section 10(6) and (7) of the *Employment Act*, 2007 (the Act). the employer is the legal custodian of all employment records.
23. The claimant last served under a written contract dated 3 January 2020 ending 31 December 2020. He filed this claim on 30 November 2022. Under the mandatory provisions of Section 90 of the *Act*, he can only go back to 3 years to make his claims. upon retirement on 31 December 2021, the claimant was barred by operation of the law to such period. This is aptly captured by the Court of Appeal in the case of *Beatrice Kabai Adagala v Postal Corporation of Kenya* [2015] eKLR that;

Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* 2007 which we have quoted verbatim herein



above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of *Divecon Limited v Samani* [1995-1998] 1 EA P.48, ... in *Josephat Ndirangu v Henkel Chemicals (EA) Limited*, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*.

24. Where employment with the respondent subsisted under Neptune Hotels Limited, upon contract dated 1st November 2011 by Mara Rianto Camp Limited the claimant ought to have urged his claims against the respondent within the meaning of Section 90 of the *Act*. The legal entity of Mara Rianto Camp Limited became the new employer ending on 30 October 2012.
25. Within the last 3 years, the claimant served under written contract with Neptune Mararianta Camp Limited and although there is a group of Companies operating under the Neptune Hotels the contracting legal entity is noted in the contract agreement the claimant signed. This was brought to his attention in the Amended Response and he offered no response or made effort to amend his claim. With advantage of legal representation, this is not a mistake but deliberate.
26. In the last phase of his employment, 1st January 2021 to 31 December 2021 the claimant had no written contract. None is produced by the respondent or any entity under the group of companies save, the terminal dues are paid under Mararianta Camp Limited.
27. Without any written contract, the claimant having worked under the group of companies opted to retire and he issued notice to the respondent. his employment at this point was protected under Section 37 of the *Act* taking into account his notice issued for 3 months and was not on a daily wage.
28. The claims made is for payment for working for the respondent for 37 years. there was break in employment and there is evidence through the various contract agreements issued to the claimant analysed above. For the last phase of employment, the claimant has since been paid the following dues;
 - 38 leave days Kshs. 138,066;
 - 27 years of service Kshs. 499,500;
 - 3 years leave travelling allowance Kshs. 16,200
29. A claim for payments for 37 years is not justified in the circumstances of this case.
30. On the claim for travelling allowances, such payment is factored for the last 3 years of employment and this is acknowledged.
31. On the claim for pending off days, the claimant did not particularise as to how these days accrued and became owed. Such claim is without merit.
32. The claimant has acknowledged receipt of Kshs. 1,000,000 paid in 3 instalments over and above his lawful terminal dues.
33. On the claims made, the court finds no merits and are hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet
..... and

