



Maluki & 4 others v Kaluworks Limited (Cause 286, 253, 289, 290 & 291 of 2017 (Consolidated)) [2023] KEELRC 2264 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2264 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 286, 253, 289, 290 & 291 OF 2017 (CONSOLIDATED)**

**M MBARÚ, J
SEPTEMBER 21, 2023**

BETWEEN

FADHILI MBWELE MALUKI CLAIMANT

AND

KALUWORKS LIMITED RESPONDENT

AS CONSOLIDATED WITH

CAUSE 253 OF 2017

BETWEEN

JOSEPH MRUU KOMBO CLAIMANT

AND

KALUWORKS LIMITED RESPONDENT

AS CONSOLIDATED WITH

CAUSE 289 OF 2017

BETWEEN

JOSEPH KALAMA TSUWI CLAIMANT

AND

KALUWORKS LIMITED RESPONDENT

AS CONSOLIDATED WITH

CAUSE 290 OF 2017



BETWEEN

ANORLD KEA CLAIMANT

AND

KALUWORKS LIMITED RESPONDENT

AS CONSOLIDATED WITH

CAUSE 291 OF 2017

BETWEEN

MUNGA NGALA NDEGWA CLAIMANT

AND

KALUWORKS LIMITED RESPONDENT

JUDGMENT

1. The lead file is ELRC Cause No.286 of 2017 and the judgment herein apply to all the consolidated files
2. The claimant is an adult and respondent is a limited liability company situated at Mariakani.
3. In February 2011 to 24 November 2016 the respondent employed the claimant as a crushing machine operator in the foundry department working 6 days each week for 8 hours as a wage of Ksh.292 per day and which increased to Ksh.318 per day.
4. The claim is that the working conditions were not good on the grounds that the claimant was underpaid, overtime was not compensated, work during public holidays was not compensated, no housing or allowance was provided or taking of annual leave and the claimant was never registered for pension or a provident fund or provided for under a CBA and not registered with NSSF contrary to Section 19 and 35 of the *Employment Act*.
5. On 24 November 2016 the claimant reported to work and Mr Mwangi for the respondent informed him that his employment had been terminated due to reduced work in the department. Termination of employment was unlawful and without a valid reason, there was no hearing and the claimant was not paid terminal dues or issued with certificate of service.
6. As a machine operator in Mariakani Township, the claimant is claiming a pay for Kshs. 16,260 per month.
7. The claimant is seeking the following;
 - a. Notice pay Kshs. 16,260;
 - b. Leave days for 4 years Kshs. 54,861.24;
 - c. Underpayments Kshs. 339,657;
 - d. Service pay for 4 years Kshs. 32,520;



- e. Compensation Kshs. 195,120;
 - f. Certificate of service;
 - g. Costs.
8. In reply, the respondent amended the responses, despite the order of consolidation, a response is filed in each claim.
 9. Under this cause ELRC No.286 of 2017 the response is that the claimant was a general labourer from 29 February 2012 to 23 November 2016 and not a machine operator as alleged.
 10. No payments were made to the claimant during his rest day or public holiday because the claimant was not at work. He was not in regular employment for 6 days each week. And when engaged, the claimant only worked for 8 hours each day. there was no underpayment as alleged and the claim should be dismissed with costs.
 11. Where the claimant had any claims for accumulated leave days, underpayments or such dues, these did not accrue within 12 months after the cessation of act of alleged negligence or default complained of and are barred by Section 90 of the [Employment Act](#).
 12. In ELRC Cause No.289 of 2017 the response is that the claimant was a general labourer from 9 June 2011 to 5 April 2016 and the claims made not justified and time barred in terms of Section 90 of the [Employment Act](#).
 13. In ELRC Cause No.290 of 2017 the claimant was employed as a machine operator from 4 June 2013 to 17 September 2016 and cause of action is barred under Section 90 of the [Employment Act](#).
 14. In ELRC Cause No.253 of 2017 the claimant was a general labourer from 24 May 2006 to 20 March 2014 and his claim is time barred in terms of Section 90 of the [Employment Act](#).
 15. In evidence, the claimants called Munga Ngala Ndegwa the claimant under Cause No.253 of 2017 who testified that he was employed by the respondent on 10 February 2013 as a machine operator at the Mariakani premises but in January 2016 when he reported to work the supervisor stopped him and said that there was reduced work. There was no notice and hearing and this led to unfair termination of employment and the claims made should be issued.
 16. In cross-examination, the claimant testified that Mwangi dismissed him from his employment on 22 January 2016 and this was his last day at work with the respondent. Mwangi is indicated as being on leave. The respondent premises are in Kilifi county and the wage paid is on a schedule and the claimant singed for Kshs. 1,164 for days worked. those allocated work would be posted on the notice board outside the respondent's premises.
 17. The claimant testified that his NSSF was deducted and remitted. At the end of employment, he opted to claim for his terminal dues.
 18. In evidence, the respondent called Hezrone Rachilo the group human resource and administration who testified that the claimants left employment on own volition on 22 January 2016 and efforts to reach out did not receive any response. Ramadhan and Matano tried to call without success. No letter court issue for lack of contacts.
 19. The claimants would be allocated work and there was a schedule. There were shifts for casual employees but NSSF dues were paid.



20. Joe Mwangi testified that he was a supervisor when the claimants were in the employment of the respondent. at the time of alleged dismissal, he was on leave and cannot have acted as alleged. The claimants had been allocated work and notice posted but failed to attend ending own employment.
21. Matano Mola Mwambire testified that he is human resource clerk and can confirm that Mwangi was on leave on the date he is alleged to have terminated the claimants in their employment.
22. Hamisi Wesa Karuku testified that he was supervising the claimants in the shifts and the last working day was 22 January 2016. He later went to look for the claimant without success.

At the close of the hearing, parties filed written submissions.

Determination

23. In response to the claims, the respondent has applied the provisions of Section 90 of the *Employment Act*, 2007 to assert that the claims for accumulated leave days and underpayments did not accrue within 12 months next after the cessation of employment and hence are time barred. That the claimants left own employment and efforts to trace them did not bear fruits and so, they cannot claim unfair termination of employment. also, the respondent asserts that the claimants were all general labourers save for Arnold Kea, claimant under Cause No. 290 of 2017 who was a machine operator and all were paid the due wages for Mariakani, Kilifi County.
24. Section 90 of the Act has two parts.
One part directs parties with an employment claim to file it in court within 3 years from the date the cause of action arose.
25. The second part requires that, within employment, where a dispute/claim of a continuing nature arise, an employee is allowed up to 12 months to address.
 90. 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.

in *The German School Society v Helga Ohany* Civil Appeal No. 325 of 2018 the Court of Appeal held that;

Undeniably, the above provision in peremptory terms bars civil actions or proceedings based or arising out of the *Employment Act* unless the same is commenced within three years next after the act, neglect or default complained of. However, where there is a continuing injury or damage, the action must be brought within twelve months after the cessation thereof.
26. However, at the end of employment, all employment dues and benefits can be claimed within 3 years from the date employment terminated. Section 90 of the Act allow an employee to claim for unpaid terminal dues within 3 years from the date the cause of action arose. While employment subsisted, the appellants was at liberty to seek in continuing injury.
27. The claimant in Cause No.286 of 2017 Fadhili Mbwele Maluki was a general labourer from 29 February 2012 to 23 November 2016. The claim was filed on 21 April 2017;
28. The claimant in Cause No.290 of 2019 Arnold Kea is admitted to have been a machine operator from 4 June 2013 to 17 September 2016. The claim was filed on 21 April 2017;



29. Claimant in Cause No.291 of 2017 Munga Ngala Ndegwa was a general labourer from 1st February 2013 to 10 January 2016. The claim was filed on 21 April 2017;
30. Claimant in Cause No.289 of 2017 Joseph Kalama Tsuwi was a general labourer from 9 June 2011 to 5 April 2016. The claim was filed on 21 April 2017; and
31. The claimant in Cause No.253 of 2017 John Mruu Kombo was a general labourer from 24 May 2006 to 7 April 2014. The Memorandum of Claim in Cause No.253 of 2019 was herein filed on 6 April 2017.
32. In terms of Section 90 of the Act all claims are filed in time, Cause No.253 of 2017 having been filed on the eve of his very last day on 6 April 2017.
33. The claimants, were all listed and employed as general labourers save for Arnold Kea who is admitted as being a machine operator.
34. As outlined above, each claimant worked continuously and without stoppage for period of beyond 24 hours for a casual employee and they remained in the service of the respondent over and above a months and closing several years. under the general terms, each claimant without a written contract of service became protected under Section 37 of the Act.
35. In the case of Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR the Court of Appeal held that;

Our reading of Section 37 of the *Employment Act* reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in *Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others* [2017] eKLR.
36. The effect of this is to secure an employee's rights and benefits under the Act. where an employer engages an employee continuously and for periods beyond what is defined as a casual employee, such employment automatically converts to employment with benefits under the Act and is protected.
37. On this basis the claims made shall be addressed on the basis that the claimants' employment was protected in accordance with Section 37 of the Act.
38. The claimants case is that they reported to work and Mwangi told them there was reduced work. They were not allowed back to work.
39. The respondent's case is that the claimants failed to attend work despite being allocated in their shift. Others were sent out looking for them without success.
40. Having been in the employment of the respondent for long periods, it is settled law that an employee cannot be found to terminate own employment unless a notice to resign has issued. The employer retains the duty to terminate employment through summary dismissal where the employee fails to attend work as required. To allege abandonment of duty must be demonstrated through written notice and where the employee cannot be traced. Such notice must issue to the Labour Officer in terms of Section 18(5)(b) of the Act particularly where this affected several employees;
 - (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report



shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.

41. To hold back and take a position that the claimants failed to report back to their shift or other employees were sent out to look for them without any notice to the labour officer is to engage in unfair labour practices. Employment terminated unfairly and without any lawful cause justified in law.
42. Notice pay is due based on the last gross wage save for Claimant in Cause No.291 of 2017 Munga Ngala Ndegwa who testified that he left his employment on 10 January 2016 and only wanted his terminal dues. a letter with regard to his notice issued and was served upon the labour officer.
43. The claimant in Cause No.286 of 2017 Fadhili Mbwele Maluki claim is that his last wage was Ksh.318 per day and was underpaid. A general labourer in Mariakani, Kilifi under the Wage Orders, the 2016 minimum wage was ksh.296.20. The claimant had a daily wage over and above the minimum and which then covered the due house allowance.
44. An analysis of the same over the years show a similar trajectory. The respondent paid a higher daily wage. the claim for a rate of Kssh.542 in the year 2016 is a rate outside the context under which the claimant was placed.
45. On the finding that there was unfair termination of employment, notice pay based on the last wage at 318 is all 9,540.
46. Compensation for unfair termination of employment on one month all at Kshs. 9,540.
47. Leave pay in terms of Section 28(2) of the Act is for the last 18 months a total of 31 days all at Kshs. 9,858 in leave pay.
48. The claimant in Cause No.290 of 2019 Arnold Kea was a machine operator last earning Ksh.296 per day in September 2016. Under the Wage Orders, a daily rate of Ksh.452. there was an underpayment of Ksh.156.
49. From 1st May 2015 to 13 September 2016 a period of 17 months, the total due underpayment is $26 \times 17 \times 156 =$ Kshs. 68,952.
50. From 1st May 2013 to 30 April 2015 the wage was 403.80 and the claimant was earning ksh.264 per day an underpayment of Ksh.139.80 and for the 24 months for 26 days = Kshs. 87,235.20.
Total underpayments being Kshs. 156,187.20.
51. Without any notice, on the last due daily rate of Ksh.452, the claimant is entitled to notice pay for 30 days all at Kshs. 13,560.
His compensation is applied at one-month wage all at Kshs. 13,560.
52. On the claim for leave pay, Section 28(2) of the Act provides for leave pay up to 18 months. Based on the rate of 21 days each year, total due is 31 days leave all at Kshs. 14,012 in leave pay.
53. Claimant in Cause No.291 of 2017 Munga Ngala Ndegwa was a general labourer from 1st February 2013 to 10 January 2016. The claimant abandoned his employment. the last wage paid of Ksh.312 per day was above the minimum allowed. Only leave pay is due for two years all at 31 days all assessed at Kshs. 9,672.
54. Claimant in Cause No.289 of 2017 Joseph Kalama Tsuwi was a general labourer from 9 June 2011 to 5 April 2016. The last wage paid was Ksh.318 above the minimum allowed and there is no



- underpayment. For unfair termination of employment, Notice pay if awarded at Kshs. 9,540 and compensation at one month Kshs. 9,540. Leave pay for the last 18 months at 31 days all at Kshs. 9,858.
55. The claimant in Cause No.253 of 2017 John Mruu Kombo was a general labourer from 24 May 2006 to 7 April 2014. The last wage paid was ksh.264 and the minimum wage due in 2014 is Ksh.264.50. the exact amount was paid. save, for unfair termination of employment, a notice pay is due based on the last daily wage all at Kshs. 7,935 and compensation at one month all at Kshs. 7,935. Leave pay for the last 18 months of employment at 31 days all at Kshs. 8,199.50.
56. The claims herein were supported by the evidence of Munga Ngala Ndegwa. He testified to the fact that NSSF dues were deducted and remitted by the respondent. service pay is not due in this regards.
57. Accordingly, judgment is hereby entered for the claimants against the respondent in the following terms;
1. Cause No.286 of 2017 Fadhili Mbwele Maluki;
 - a. Notice pay 9,540;
 - b. Compensation Kshs. 9,540;
 - c. Leave pay Kshs. 9,858.
 2. Cause No.290 of 2019 Arnold Kea;
 - a. Underpayment Kshs. 156,187.20;
 - b. notice pay Kshs. 13,560;
 - c. compensation Kshs. 13,560;
 - d. leave pay Kshs. 14,012.
 3. Claimant in Cause No.291 of 2017 Munga Ngala Ndegwa;
 - a. leave pay Kshs. 9,672.
 4. Claimant in Cause No.289 of 2017 Joseph Kalama Tsuwi;
 - a. notice pay Kshs. 9,540;
 - b. compensation Kshs. 9,540;
 - c. Leave pay Kshs. 9,858.
 5. The claimant in Cause No.253 of 2017 John Mruu Kombo;
 - a. Notice pay Kshs. 7,935;
 - b. compensation Kshs. 7,935;
 - c. Leave pay Kshs. 8,199.50.

Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet Muthaine

..... and

