



**Muga & 2 others v Sinohydro Corporation Ltd (Cause 49 of 2019)
[2023] KEELRC 2353 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2353 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 49 OF 2019
CN BAARI, J
OCTOBER 5, 2023**

BETWEEN

BOAZ OKEYO MUGA 1ST CLAIMANT

HELIDA ATIENO OKEYO 2ND CLAIMANT

KENNEDY ODHIAMBO OKOYO 3RD CLAIMANT

AND

SINOHYDRO CORPORATION LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimants' are the Administrators of the estate of one Kennedy Odhiambo Okeyo. They lodged a Memorandum of Claim dated 27th May, 2019, and filed in Court on 29th May, 2019, seeking orders for payment by the Respondent, being the deceased former employer, of his two months unpaid salary, gratuity and benefits from the insurance cover.
2. The Respondent entered appearance and with the leave of Court, filed a response to the memorandum of claim on 24th March, 2023.
3. Both the Claimant's and the Respondent's cases were heard on 20th June, 2023. Mr. Boaz Okeyo testified for the Claimants. He adopted his witness statement and produced documents filed in the matter in support of their case. The Respondent presented the evidence of one Wang Xiaoxiao, their Project Assistant Manager in support of its case.
4. Both parties closed their respective cases on 20th June, 2023, paving way for filing of submissions. submissions were filed for both parties.



The Claimants' Case

5. The Claimants' case is that the deceased (Kennedy Odhiambo Okeyo) was an employee of the Respondent from the year 2013, until his untimely death on the 11th October, 2015. It is their further case that the deceased earned a monthly salary of USD 2500 (Two Thousand Five Hundred US dollars) which was to be converted to Saudi Riyals in accordance with the rate of 1st day of each month in local bank, plus Saudi Riyals 500 allowance for food, transport and communication and USD 100 allowance for accommodation.
6. It is their case that the deceased entered into a supplementary agreement on the 28th July, 2014, whereupon, his salary was adjusted to SR 1,700 (One Thousand Seven Hundred Saudi Riyal).
7. The Claimants aver that they duly informed the Respondent of the death of Kennedy Odhiambo Okeyo, and further demanded his two months unpaid salary, gratuity and pension, but which it refused to pay and continued to withhold the deceased terminal benefits unlawfully and without any justifiable reasons.
8. The Claimants aver that the Respondent in an attempt to settle the deceased gratuity, salary for two months and other dues, paid to the family a measly 523,284(Five Hundred and Twenty Three Thousand, Two Hundred and Eighty Four Thousand Shillings) which is extremely low and not the amount he was entitled to as per the contracts.
9. The Claimants pray that Court orders the Respondent to pay all the money owing to the deceased, specifically, two months' salary, gratuity and pension based on an inflation rate of 10%.
10. In his testimony, CW1 told this Court that his son/deceased died on 11/10/2015 and the benefits paid to him by the Respondent were made on 22nd October, 2015 on account of his deceased son terminal dues.
11. He further stated that his claim is based on the fact that the deceased was paid USD1581 instead of USD 2500.
12. On cross-examination, CW1 told the Court that his son died on 11/10/2015 and he filed this suit on 29/5/2019, and which he believes is within the statutory time lines. He further confirmed that his son who worked for the Respondent and stationed in Saudi Arabia was not terminated, but that he passed on while on holiday in Kenya.
13. CW1 further confirmed on cross-examination that they received a total of Kshs. 523,284 from the Respondent on account of the deceased terminal benefits. He told Court that he does not know whether the deceased contract provided for payment of gratuity.

The Respondent's Case

14. The Respondent states that it engaged Kennedy Odhiambo Okeyo (the deceased) on a fixed term contract of 3 years running from April, 2013 in the Kingdom of Saudi Arabia. It further states that parties subsequently executed a supplementary Agreement dated 28th July, 2014 which enhanced the deceased's terms of service.
15. It is the Respondent's case that the deceased at all times material to this suit worked in the construction of Yanbu Industrial College Expansion & Educational Building in the Kingdom of Saudi Arabia. It further states that during his tenure of service, the deceased regularly received his dues as agreed up to 11th October, 2015, when he passed on suddenly after travelling to Kenya from his place of work in the Kingdom of Saudi Arabia.



16. The Respondent's case is that the deceased was never terminated nor in any other way dismissed from employment.
17. The Respondent avers that upon the untimely death of the deceased, a representative of his family and a brother of the deceased called Bernard Ogweno Okeyo, was authorized by the family to collect his employment related dues from the Respondent.
18. The Respondent further states that upon confirming the relationship and details of authorization by the family, it tabulated the deceased dues as at the time of his death, and paid out a total sum of Kshs.523,284.00 comprising of a one month's salary, end of service pay and a solatium.
19. It is the Respondent's case that the payment made to the Claimants' kin and referred to above, is admitted in the claim and a Memorandum of Agreement dated 22nd October, 2015, was also executed on the said payment by the Respondent and the deceased's next of kin as admitted in the Claimant's statement.
20. The Respondent denies owing the deceased or the administrators of his estate any payment in form of two months' salary, gratuity, pension, or benefits from the insurance cover. The Respondent further denies holding any dues or statutory entitlements of the deceased considering that the payment had already been made to the deceased's next of kin.
21. It is the Respondent's further case that the primary contract of service between the parties was executed and performed in the Kingdom of Saudi Arabia and the Claimants have failed to demonstrate how the Kenyan court should intervene to redress the allegations on non-performance of the primary contract.
22. The Respondent states that this is an employment dispute and which was filed outside the statutory period of 3 years, and is time barred per Section 90 of the Employment Act and should be struck out.
23. Mr. Wang (RW1) testifying for the Respondent, told the Court that the Respondent did not receive any demand for payment of any additional amount, after it paid the Claimants the deceased terminal dues in October, 2015.
24. It is his testimony that the amount paid to the Claimants was to cover salary and solanium and the salary was based on days worked premised on the figures paid in the last two months before his demise.
25. RW1 further told this Court on cross-examination, that it has branch offices in Kenya and some of the agreements were signed in Kenya. It is his further evidence that the deceased salary was paid in local currency and not in US dollars.
26. RW1 further stated that the insurance cover only covered employment related injuries. He further told court that the deceased was not entitled to a gratuity.

The Claimant's Submissions

27. Although the Claimants' counsel had indicated to Court that he had field submissions, none were found on the online portal nor was any physical copy of the submissions received at the court registry.

The Respondent's Submissions.

28. It is submitted for the Respondent that if the Claimants had any issue with the payment made, then time started running from 22nd October 2015, when the Claimants and the Respondent signed the discharge. It is further submitted that it then follows that this action ought to have been commenced within 3 years which fell on 21st October 2018, but which suit was commenced on 29th May 2019, three years and seven months later-a period long after the expiry of the prescribed statutory timelines.



Reliance was had to the holding in John Kiiru Niiiri v University of Nairobi [20211 e KLR to support this position.

29. The Respondent submits that pursuant to the discharge dated 22nd October, 2015, the Respondent discharged its obligation and remitted the entire terminal dues to the Claimants. It is further submitted that parties willingly executed the Agreement and in the absence of any vitiating factors, the Court should decline the invitation to veer off from its terms.
30. The Respondent submits that the Claimant has not challenged the validity of the Agreement and the same should not be disturbed. It sought to rely on the holding of the Court of Appeal in Coastal Bottlers Ltd V Kimathi Mithika (2018) eKLR where the Court held thus;

“Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties. ”
31. The Respondent submits that gratuity is a creature of contract and can only be claimed where it is provided for in the employment contract. Reliance was placed on the Court of appeal decision in Bamburi Cement Limited v William Kilonzi [20161 eKLR, where the Court discussed the elements of gratuity and further asserted that gratuity is contractual.
32. The Respondent further submits that the prayer for payment of gratuity has no basis and the same should fail, and urges the court to reject the claim.
33. The Respondent finally submits that the claim concerning the insurance cover has no support in law since it is trite that for such a claim to stand, the insured risk must have occurred, while the insured risk was for injuries suffered by an employee in the course of work.

Analysis and Determination**

34. I have considered the pleadings, the witnesses’ oral testimonies and the parties’ submissions. The issues for determination are:
 - i. Whether the suit herein is Statute barred
 - ii. Whether the Claimants are entitled to the remedies sought

Whether the suit herein is Statute barred

35. Section 90 of the *Employment Act* 2007, states;

“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.”
36. The 1st Claimant (CW1) who is the father of the deceased subject of this suit, told this Court that his son/deceased died on 11/10/2015, while on holiday in Kenya. It is his position that Kshs. 523,284/- was paid to them on account of the deceased terminal benefits through his other son whom he



authorized to receive the benefits, and who in return, executed an agreement to this effect on 22nd October, 2015.

37. The two dates mentioned above (11/10/2015 and 22nd October, 2015) are the relevant dates in determining whether or not this suit is statute barred.
38. The question is on which of the two dates did the cause of action accrue for time to start to run. Courts have made various pronouncements on when time begins to run. In *Hilarion Mwabolo v Kenya Commercial Bank* (2013) eKLR The Court stated thus on the accrual of a cause of action:

“ .. the cause of action under Section 90 of the *Employment Act*, 2007 accrues from the date of termination as stated in the termination letter....”
39. Further, the Court of Appeal in *David Ngugi Waweru v Attorney General & Another* (2017) eKLR, stated that the time of dismissal or termination, is the time contained in the letter of termination/ dismissal and not the time of conclusion of internal disciplinary mechanisms. Again in *Anne Waithira Kimani v Stephen Ndungu Njenga* (2013) eKLR, the court held that the cause of action arose when the resignation took effect.
40. Taking the foregoing instances into consideration against the two dates referred to herein, the courts are in agreement that the date of termination or resignation are the dates when the cause of action arises. In this matter, however, the employee was neither terminated nor did he resign. He instead, died and hence the separation.
41. It would in my view be correct to say that the deceased terminal dues became due and payable upon his death. The benefits were however paid swiftly and within only about ten (10) after the death on 22nd October, 2015, hence the payment was not the borne of contention.
42. The amount paid on account of terminal dues is in my view, the issue in dispute in the suit, which leads me to the conclusion that the cause of action arose on the date of payment which is 22nd October, 2015.
43. It then follows that the cause of action herein, was three years old by October, 2018, and therefore, the suit having been lodged in May, 2019, is time barred by close to seven (7) months.
44. In *Gathoni vs. Kenya Co-operative Creameries Ltd* Civil Application No. 122 of 1981, Potter, J. observed in obiter that;

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
45. In *Kenya Electrical and Allied Workers Union v. Kenya Power and Lighting Ltd* (2015) eKLR, Radido J held that a limitation of actions provision is a jurisdictional issue which would mean that after a certain period the court has no power to entertain an action. The Court in the same matter, while citing the Court of Appeal decision in *Divecon v. Samani* (1995-1998) EA 48, stated that no court may or shall have the right to entertain what cannot be done.
46. In the upshot, I find and hold that the Claimants’ claim filed on 29th May, 2019, is statute barred and is for striking out. It is hereby struck out with no orders on costs.
47. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 5TH DAY OF OCTOBER, 2023.



C. N. BAARI

JUDGE

Appearance:

Mr. Omondi T present for the Claimant

Mr. Wanga present for the Respondent

