



**Ngutu (Suing as the Legal Representative of the Estate of the Late Jackson Waita Ivulu) v Southern Cross Safaris Limited & 2 others (Cause 432 of 2018) [2023] KEELRC 3174 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3174 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE 432 OF 2018**  
**M MBARŪ, J**  
**NOVEMBER 30, 2023**

**BETWEEN**

**NORAH NDILA NGUTU ..... CLAIMANT**  
**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JACKSON WAITA IVULU**

**AND**

**SOUTHERN CROSS SAFARIS LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**  
**SATAO CAMPS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. In a ruling delivered on 16 July 2021, the court held that the claim against the 3<sup>rd</sup> respondent, Santao Camps Limited is time barred. The claim is against the 1<sup>st</sup> and 2<sup>nd</sup> respondents only.
2. The 1<sup>st</sup> respondent, Southern Cross Safaris Limited employed Jackson Waita Ivulu (deceased, herein represented by his Legal Representative, Norah Ndila Ngutu) in the year 2006 as a driver at a wage of KShs. 15,715 per month and posted to work for the 3<sup>rd</sup> respondent. He worked until July 2011 when he was charged together with another driver in Mombasa Criminal Case No.2562 of 2011.
3. The claim is that the deceased was suspended through letter dated 27 July 2011 pending investigations. That the charges made against the deceased were with malice because there was no investigation and the complaint made was without any justification leading to false charges. The criminal case was concluded through judgment on 13 September 2016 with an acquittal under Section 215 of the [Criminal Procedure Code](#).



4. During the suspension, the deceased was not paid his salaries and applied to the 3<sup>rd</sup> respondent seeking reinstatement but this went without a reply. The deceased died on 20 January 2017 before his terminal dues were paid.
5. The claimant's case is that the 1<sup>st</sup> respondent should pay the following terminal dues;
  - a. Notice pay Kshs. 15,715;
  - b. Salary arrears from August 2011 to November 2016 Kshs. 990,045;
  - c. 21 leave days for 5 years Kshs. 58,931;
  - d. Unremitted allowances;
    - i. Travelling allowances Kshs. 1,500 x 5 Kshs. 7,500;
    - ii. Camp allowance 400 x 248 days' x 5 years Kshs. 496,000;
  - e. Compensation for unfair termination of employment Kshs. 188,580;
  - f. General damages for malicious prosecution; and
  - g. Costs of the suit.
6. In reply to the Amended Response of the 1<sup>st</sup> respondent, the claimant's case is that it issued the deceased with a letter of appointment and confirmation therefore signed by the Human Resource Manager. The claims made are justified and have not been settled.
7. The claimant testified in support of the claim. She filed Mombasa CMCC Succession Cause 20 of 2018 to represent the Estate of the late Jackson Waita Ivulu, formerly employed by the 1<sup>st</sup> respondent.
8. That the deceased explained to her the nature of his employment as a driver with the 1<sup>st</sup> respondent who placed him to work for the 3<sup>rd</sup> respondent. During the 2007-2008 post-election violence he was released from his employment but was later recalled and issued with letter of appointment as a driver guide in the year 2011 at a wage of Kshs. 15,715. The deceased worked until July 2011 when he was arrested together with another driver, Martin Idaya Mbugua and charged with the offence of stealing by servant following loss of fuel by their employer. He was charged in Mombasa Criminal Case No.2562 of 2011 and when he returned to work, he was denied access. He was not paid from the date of suspension. He attended court for 5 years and then acquitted and despite the 1<sup>st</sup> respondent being aware, they have refused to pay his terminal dues.
9. The claimant testified that the deceased was taking care of his young family of two school going children and following criminal charges and failure by the 1<sup>st</sup> respondent to pay his dues, he suffered loss and damage. Despite demand being issued, the claims made have not been paid.
10. In response, the 1<sup>st</sup> respondent's case is that it employed the deceased on 14 August 2006 to 15 January 2008 in the capacity of coach driver. At the end of employment, a Certificate of Service was issued. After 15 January 2008 there was no employment relationship as alleged.
11. The 1<sup>st</sup> respondent is a stranger to any criminal proceedings against the deceased claimant while in its employment from 14 August 2006 to January 2008. The letter dated 10 November 2016 was not addressed to the 1<sup>st</sup> respondent.
12. The claim was filed in June 2018 more than 10 years since the claimant was rendered redundant and any claims thereof are time barred and the claim against the 1<sup>st</sup> respondent should be dismissed with costs.



13. In evidence, the 1<sup>st</sup> respondent called Fareed Osman the Accountant who testified that the respondent is a touring company while the 3<sup>rd</sup> respondent is a different and separate legal entity, a lodge in the Tsavo East Park. Each company has its own employees.
14. The late Jackson was an employee and driver of the 1<sup>st</sup> respondent until January 2008. There was a redundancy and his dues were fully paid and no case was filed. There was no further employment.
15. Mr Fareed testified that he is aware that the deceased and Martin were charged in a criminal case. Martin was a driver of the 1<sup>st</sup> respondent while the deceased was an employee of the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent has since filed Notice of Objections to the claim for being filed out of time. These objections were allowed through ruling delivered on 16 July 2021. The court established that the deceased was last working for the 3<sup>rd</sup> respondent in the year 2011. His employment with the 1<sup>st</sup> respondent had since ceased.
16. Upon cross-examination, the claimant confirmed that the deceased was an employee of the 1<sup>st</sup> respondent until the year 2008. That Martin Idaya filed ELRC Cause No.480 of 2017 against the 1<sup>st</sup> respondent as the employer. The suspension letter filed herein was issued by the 3<sup>rd</sup> respondent.
17. Even though the respondents could use the same employees, termination of employment was by the principal employer. In the year 2011, the deceased was an employee of the 3<sup>rd</sup> respondent.
18. The 2<sup>nd</sup> respondent response is that the deceased was arrested and detained following a report made to the police and upon investigations found reasonable cause to believe and suspect that a criminal offence had been committed by the deceased. The police acted in honest cause and belief in instituting a criminal charge against the deceased. This is in fulfilling their mandate under the law and the claims made are without merit.
19. No witness was called.
20. At the close of the hearing, parties filed written submissions.
21. The claimant submitted that in proof of employment, the 1<sup>st</sup> respondent issued the claimant with Certificate of Service dated 8 February 2011. The 1<sup>st</sup> respondent employed the deceased and placed him at the 3<sup>rd</sup> respondent and then proceeded to report a criminal case to the police leading to the deceased being charged in Mombasa Criminal Case No.2562 of 2011. In the judgment thereof, the employer is noted as the 1<sup>st</sup> respondent. The leave form is signed by the 1<sup>st</sup> respondent. The CR12 for both companies show they are connected through shareholding.
22. The claimant submitted that in ELRC No. 480 of 2017, Martin Idaya had been charged together with the deceased, his claim against the 1<sup>st</sup> respondent was settled. There was employment which is not disputed. In the case of *Phillip Ateng Ogunk & 27 others v Westmnt Power (K) Limited & another* [2015] eKLR the employees were faced with a network of companies around their employment seeking to avoid the duties of an employer. The court held that the alleged separateness of the companies was just but a concealment aimed at placing barriers in the way of the employees in realising their employment rights. Arrangements crafted by employers which tend to limit employees in actualisation of their rights must not be endorsed by the court.
23. The deceased was acquitted of the criminal charges, his employment was wrongfully terminated and the claim for notice pay and compensation are justified. The unpaid wages together with allowances are payable like the 1<sup>st</sup> respondent paid the claimant in ELRC Cause No.480 of 2017. For the malicious prosecution, damages should be paid.



24. The 1<sup>st</sup> respondent submitted that the claimant was an employee until 17 January 2008 when he was issued with a Certificate of Service following a redundancy. The claim was not filed until the year 2018 a period of over 10 years. The records filed confirm that the claimant had a different employer through letter dated 8 February 2011 and the pay slip for March 2011 is by a different employer. The suspension letter dated 27 July 2011 is by a different entity different and separate from the 1<sup>st</sup> respondent. The demand letter of 10 November 2016 was not to the 1<sup>st</sup> respondent.
25. The claims made are filed out of time and against the wrong employer. Based on the pleadings, the 1<sup>st</sup> respondent lawfully ceased its employment with the claimant in January 2008 and the claims made should be dismissed as held in [Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited](#) [2016] eKLR.
26. The claimant has relied on the case of Martin Idaya to support the claims herein but he was an employee of the 1<sup>st</sup> respondent while the claimant last served under the 3<sup>rd</sup> respondent which matter was addressed by the court and there is no appeal. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are different and separate legal entities and the 1<sup>st</sup> respondent cannot be held liable for the actions of another person as held in [Regina Kavenya Mutuku & 3 others v united Insurance Co. Limited](#) [2002] eKLR.
27. The claim having been filed after 10 years, it is time barred in terms of Section 90 of the [Employment Act](#), 2007 (the Act). The criminal charges were based on a reasonable complaint lodged with the police and the 1<sup>st</sup> respondent cannot be held liable.
28. The 2<sup>nd</sup> respondent did not file any written submissions.

#### **Determination**

29. As noted above, through ruling delivered on 16 July 2021, the court held that the claims made against the 3<sup>rd</sup> respondent were time barred. This related to claim that, following notice and suspension of the claimant (deceased, Jackson) on 27 July 2011, he filed his claim on 21 June 2018 outside the limitation period.
30. The Certificate of Service issued by the 1<sup>st</sup> respondent to the claimant on 17 January 2008 is not challenged.
31. Through letter dated 8 February 2011 the 3<sup>rd</sup> respondent confirmed the deceased in his employment as a Driver Guide. Through letter dated 27 July 2011, the 3<sup>rd</sup> respondent suspended the deceased to allow for investigations following unauthorised use of the fuel credit card while in his possession.
32. The claimant was then charged with the offence of stealing by servant in Mombasa Criminal Case No.2562 of 2011 whereupon he was acquitted on 13 September 2016. He was not reinstated back to his employment. He filed suit on 21 June 2018.
33. Whereas employment with the 3<sup>rd</sup> respondent is addressed, the fact of the claimant's employment with the 1<sup>st</sup> respondent ceasing on 16 January 2008 through a redundancy is not challenged in any material way. Any claim arising thereof with regard to non-payment of terminal dues or the continuing injury of non-payment of wages and allowances thereof ought to have been addressed within the meaning of Section 90 of the [Act](#).
34. Even where the shareholding of the 1<sup>st</sup> and 3<sup>rd</sup> respondents is intertwined with employees allowed to work under the different entities and management, the accountant being the same and the operational offices holding the same staff, where the claimant was suspended through notice dated 27 July 2011, even with his criminal case in Mombasa Criminal Case No. 2562 of 2011 ongoing, he ought and should have addressed any claims thereof within the meaning of Section 90 of the [Act](#). His claims as herein



done should have been addressed within 12 months with regard to non-payment of his wages as a continuing injury or cumulatively all his claims ought to have been addressed within 3 years. On or before 26 July 2014.

35. The ongoing criminal proceedings ending on 13 September 2016 were not a bar to him filing a claim to assert his employment rights. His right to secure his employment and labour relations claims should have been addressed despite the ongoing criminal proceedings. The Court of Appeal in *Attorney General & another v Andrew Maina Gitbinji & another* [2016] eKLR held that;

A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein.

...

By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'.

36. Whatever claims the claimant may have had against the 1<sup>st</sup> respondent following issuance of the Certificate of Service dated 17 January 2008, such ought to have been addressed within 3 years therefrom. Whatever claim that may have arisen against the 1<sup>st</sup> respondent with regard to its connectedness with the 3<sup>rd</sup> respondent as the main shareholder thereof and in terms of the meaning of an 'employer' defined under Section 2 of the *Act* to include any agency, such should have been addressed within 3 years from 27 July 2011 following the letter of suspension.
37. The claim filed against the respondents is way after the 3 years lapsed and is time barred pursuant to Section 90 of the *Act*. The court is denied jurisdiction to address any claims thereof. To assess what is due to the claimant is purely academic.
38. The advocates for the 3<sup>rd</sup> respondent are the same for the 1<sup>st</sup> respondent. The Notice of Objections leading to the ruling delivered on 21 July 2021 arose from the same legal representation. There have been amendments to the pleadings since but the import of Section 90 of the *Act* was not gone into timeously. No costs shall issue.
39. Accordingly, the claims being time barred in terms of Section 90 of the *Act*, the court is without jurisdiction to proceed and assess the claims made. Claim is hereby struck out. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

