



**Imbayi (Suing on behalf of George Ochieng (Deceased) v Gajipara Builders Ltd  
(Cause 424 of 2017) [2023] KEELRC 2724 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2724 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 424 OF 2017  
DN NDERITU, J  
NOVEMBER 2, 2023**

**BETWEEN**

**GENOVEVA MUKARA IMBAYI (SUING ON BEHALF OF GEORGE OCHIENG  
(DECEASED) ..... CLAIMANT**

**AND**

**GAJIPARA BUILDERS LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant is the widow and the administratrix of the estate of the late George Ochieng (deceased) who died on 16<sup>th</sup> September, 2016; she holds a limited grant of letters of administration ad litem issued to her by the Ukwala Senior Resident Magistrate’s court on 30<sup>th</sup> August, 2017.
2. In a statement of claim dated 2<sup>nd</sup> October, 2017 filed through R. M. Onyancha & Co Advocates the claimant prays for: -
  - a. Underpayments
  - b. Normal overtime
  - c. Off duties
  - d. Public holidays
  - e. Leave for 31 years
  - f. Costs of this suit to be borne by the Respondent
3. The above prayers are itemized and quantified as follows –
  1. Underpayments - 166,090.20



2. Normal overtime - 278,502.20
  3. Off duties - 295,886.15
  4. Public holidays - 128,002.95
  5. Leave for 31 years - 334,722.50
- Grand totals - Kshs.1,203,204.00
4. Together with the statement of claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim. The documents include a certificate of death and the limited letter of administration ad litem of the estate of the deceased.
  5. On 23<sup>rd</sup> September, 2021 the claimant appointed Munene Chege & Co. Advocates to act for her in place of R. M. Onyancha & Co. Advocates.
  6. On 7<sup>th</sup> November, 2017 the respondent entered appearance through Nancy Njoroge & Co. Advocates and filed a reply to the memorandum of claim on 17<sup>th</sup> November, 2017. In the said reply the respondent prays that the claimant's cause be dismissed with costs for want of merits.
  7. In addition to the reply to the claim, the respondent filed witness statements and a list of documents dated 28<sup>th</sup> February, 2018 and copies of the listed documents. A further list of documents and copies of the listed documents was filed on 14<sup>th</sup> October, 2022.
  8. This cause came up for hearing in open court on 3<sup>rd</sup> October, 2022 when the Claimant (CW1) testified and closed her case. The defence was heard on 31<sup>st</sup> January, 2023 with Duncan Kimemia (RW1) testifying and the respondent's case was closed.
  9. Counsel for the claimant, Miss Daye, addressed and summed up her client's case by way of written submissions filed in court on 6<sup>th</sup> March, 2023. Counsel for the respondent, Mrs. Kairu, filed her submissions on 3<sup>rd</sup> March, 2023.

## **II.The Claimant's Case**

10. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by her Counsel and the same is summarized as hereunder.
11. In her statement of claim, the Claimant pleaded that the deceased was an employee of the respondent as a store-supervisor from June,1985 to August, 2016, a period of 31 years of uninterrupted service. It is alleged that during that entire period the deceased worked from 7am to 5pm on weekdays and from 8am to 1pm on Sundays and public holidays without leave or off-duty. It is pleaded that the deceased was underpaid during the entire period of service. It is stated that he was earning a monthly gross salary of Kshs.15,000/= by September, 2016 when he passed on.
12. The above allegations are restated in the written statement of the claimant dated 2<sup>nd</sup> October, 2017 that was filed alongside the memorandum of claim.
13. In her testimony in court, the claimant relied on her filed statement and reiterated the contents in the memorandum of claim and she produced the filed documents as exhibits 1 to 7.
14. In cross-examination, the claimant stated that while the respondent filed a certificate of incorporation confirming that it was incorporated on 16<sup>th</sup> April, 1991 it existed and did business prior to that date of incorporation and that the deceased was their employee from 1985. She clarified that the deceased died



of natural causes and not due to work-related illness. She stated that after the death of her husband she was “given” a sum of Kshs.45,000/= by the respondent to apply in funeral expenses. She admitted that she signed petty-cash vouchers for the same. She also remained in the company house for two months after the death of the deceased for free, without paying for rent, water, and electricity. She also clarified that the deceased was a storekeeper not a store-supervisor.

15. In re-examination she stated that she did not receive the Kshs.45,000/= as terminal dues for the deceased but as support in burying her husband. She insisted that she was not informed that the said sum was in settlement of deceased’s terminal dues.
16. It is on the basis of the foregoing that the claimant is seeking for the reliefs recited above. The submissions by her counsel shall be considered in the succeeding parts of this judgment.

### **III. The Respondent’s Case**

17. The respondent’s case is expressed in the response to the claim and the oral and documentary evidence adduced through RW1 and the written submissions by its counsel; the respondent’s case is summarized as hereunder.
18. In the filed response to the claim the respondent denies all the allegations levelled against it by the claimant and more so that it is liable for payment of any of the dues claimed. It is pleaded that the deceased was paid all his dues and that none was outstanding at the time of the death of the deceased whose illness and death was not work-related.
19. In his testimony in court, RW1 stated that he is an accountant with the respondent and has worked thereat since 2010. He stated that the deceased worked as a storekeeper from 1997 up to his death on 16<sup>th</sup> September, 2016. He stated that as evidenced by the certificate of incorporation the respondent was incorporated on 26<sup>th</sup> April, 1991. He denied that the respondent was trading or doing business prior to the date of incorporation.
20. He stated that upon the death of the deceased the respondent met the attendant medical bills and funeral and burial expenses. He stated that at no time was the deceased underpaid as alleged, and that he was actually overpaid based on the applicable legal notices for minimum wage regulations which the respondent produced as exhibits. He stated that the deceased worked from 0800hrs to 1700hrs during weekdays with a 30minutes tea break at 1000hrs and one-hour lunch break between 1300hrs and 1400hrs. It is alleged that the deceased working from 0800hrs to 1300hrs with a 30 minutes tea break at 1000hrs on Saturdays.
21. He testified that the deceased was paid for all his leave days as per the exhibits produced. He specifically stated that leave allowance for 2016 was paid to the claimant who signed for the same as per the records produced in court. He stated that all dues to NSSF and NHIF as deducted from the remuneration of the deceased were remitted in accordance with the law.
22. Further, RW1 stated that a sum of Kshs.45,000/= was paid to the claimant upon the demise of the deceased to cover salary for September, 2016 and other dues.
23. RW1 produced the documents filed by the respondent as exhibits 1 to 90 insisting that the evidence proves that nothing is due and payable to the claimant as claimed.
24. In cross-examination, he insisted that the respondent was incorporated in 1991 and it did not do business before then and as such there is no way that the deceased could possibly have been its employee in 1985 as it did not exist. He insisted that the deceased was engaged in 1997, notwithstanding an exhibit produced by the claimant indicating that the deceased was engaged by the respondent in 1985.



He was emphatic that the deceased worked for eight hours a day as stipulated above and was housed by the respondent and as such no house allowance was payable.

25. It is on the basis of the foregoing that the respondent has pleaded that this cause be dismissed with costs. The submissions by its counsel shall be considered alongside those by counsel for the claimant in the succeeding parts of this judgment.

#### **IV. Issues For Determination**

26. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the Claimant and RW1, and the submissions by counsel for both parties, the court identifies the following issues for determination –
- a. For what period did the deceased work for the respondent?
  - b. Is the Claimant entitled to the reliefs sought in the claim?
  - c. Who meets the costs in this cause?

#### **V. Period Of Employment**

27. To a large extent the terms of engagement of the deceased by the respondent are not in dispute except for the date of employment. The deceased worked for the respondent as a storekeeper until his death on 16<sup>th</sup> September, 2016. His last recorded gross monthly salary was Kshs.15,000/= and he was housed by the respondent and as such no house allowance was payable.
28. The claimant alleges that the deceased was employed in 1985 and produced as an exhibit a document titled “Employees Details” to allegedly back-up her allegation. However, the said document was disowned by the respondent on two fronts. Firstly, it is categorically posited that the respondent was incorporated in 1991 and there is no way it possibly could have executed a document in 1985 as it did not exist. Secondly, it was stated that the said document is neither signed nor sealed or officially stamped by the respondent. Curiously, the said document was allegedly executed by the deceased in 2006. It is the respondent’s position that the deceased was engaged in 1997. However, the respondent did not avail any records for proof of the date when the deceased was employed as the muster rolls availed run back to 2009 and not beyond.
29. In the foregoing scenario, it can only be presumed that the deceased was engaged by the respondent as at the time of its incorporation in April, 1991. However, as it shall be demonstrated in the following paragraphs of this judgment, the date of employment of the deceased shall not be as important as both sides implied and pitched battle on the same. This is because for purposes of assessing any compensation or dues payable to the claimant the court cannot bed backwards beyond three years from the date of the rising of the cause of action in view of the express limitation under Section 90 of the Employment Act (the Act) which provides as follows –
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.
30. For now, the court shall presume that the deceased was engaged by the respondent as a storekeeper from the year of its incorporation in 1991 and that he remained as such employee until his death on 16<sup>th</sup> September, 2016.



## VI. Reliefs

31. Having held as above in regard to the date of employment of the deceased this court shall now consider each of the reliefs sought as hereunder.
32. Prayer (1) is for underpayments in monthly salary for the period from 1<sup>st</sup> May, 2009 to 30<sup>th</sup> July, 2016 calculated at a total of Kshs.166,090.20. This cause was filed in court on 16<sup>th</sup> October, 2017, which is well within three years of the demise of the deceased which gave rise to the cause of action. Counting three years backwards from the date of the death of the deceased on 16<sup>th</sup> September, 2016 the period that may be considered goes back to September, 2013.
33. Vide Legal Notice (LN) 197 which came into operation on 1<sup>st</sup> May, 2013 the minimum basic monthly salary for a storekeeper within the former municipality of Nakuru was fixed at Kshs.13,772.70. This was the lawful and applicable minimum pay to the deceased for the period from 1<sup>st</sup> May, 2013 to 30<sup>th</sup> April, 2014.
34. From the records availed by the respondent, the muster roll, as of September, 2013 the deceased was earning Kshs.13,500/= which means that he was underpaid by Kshs.272.70. This means that for the period from 1<sup>st</sup> May, 2013 to 30<sup>th</sup> April, 2014 the deceased was underpaid by  $Kshs.272.70 * 12 = Kshs.3,272.40$ .
35. For the period from 1<sup>st</sup> May, 2014 to 30<sup>th</sup> April, 2015 the duly signed muster roll indicates that the deceased was paid Kshs.15,000/= as basic pay per month as against the regulated minimum wage of Kshs.13,772.70. This clearly demonstrates that the deceased was overpaid.
36. LN 117 which came into effect on 1<sup>st</sup> May, 2015 provides that the deceased was supposed to be paid Kshs.15,425.40 yet he was on a pay of Kshs.15,000/=. This means that the deceased was underpaid in the sum of  $Kshs.425.40 * 12 = Kshs.5,104.80$  for the period from 1<sup>st</sup> May, 2015 to 30<sup>th</sup> April, 2016. Both counsels are wrong in their submissions on this item.
37. So, in terms of underpayments the claimant is awarded a total of  $Kshs.3,272.40$  plus  $Kshs.5,104.80 = Kshs.8,377.20$ .
38. Prayer (2) is for normal overtime in the sum of Kshs.278,502.20 from 1<sup>st</sup> May, 2002 to July, 2016. Again, this claim is far way stretched beyond the three years limit from the date when the cause of action arose. Going backwards from September, 2016, when the deceased died, the three years go back to September, 2013. Any overtime payable should not go beyond 2013.
39. Under Sections 10 and 74 of the Act, an employer is obligated to keep records of employment. In this item under consideration the claimant alleges that the deceased worked for overtime without pay and the only way the respondent should have rebutted this claim is by availing records on the time-in and time-out for the deceased on daily basis. The respondent failed in this duty and obligation and as such the word of the claimant stands unchallenged as the respondent is the custodian of the records and it failed to produce the same and or to explain to the satisfaction of the court why the records were not availed and or did not exist.
40. In the circumstances, this item is allowed but only for the period from September, 2016 backwards to September, 2013, or simply for the years 2013 to 2015 calculated as  $Kshs.61,023.65 + Kshs.42,716.50 = Kshs.103,740.15$ .
41. Prayer (3) is for off-duties in the sum of Kshs.295,886.15. Again, the court can only award for the last three years preceding the arising of the cause of action. This covers 2013 to 2016. The respondent



availed duly signed records confirming that indeed the deceased was paid for off-days and holidays. There is no reason advanced as to why this court has to revisit this item that was duly agreed and settled by the parties when the deceased was alive. For that reason, this prayer is denied.

42. For the same reason stated above, the claim for public holidays pay is denied as the record shows that the deceased was paid and signed for the said payment for which no reason has been advanced for the court to disturb the same.
43. Prayer (5) is for leave pay for 31years in the sum of Kshs.334,722.50. This plea is again wrong as it goes beyond the limitation of three years from the date of the arising of the cause of action. However, the respondent availed in court and produced records confirming that the deceased was paid and signed for his leave allowance for all the years. The records produced as exhibits cover 2003 to 2016 wherein the deceased was duly paid and signed for the same. This court has not been persuaded in any way as to interfere with the said settlements, and more so for the period from 2013 to 2016 which is within the statutory limits. This claim is denied.

#### **IV. Costs**

44. Costs follow the event and therefore the Claimant is awarded costs of this cause.

#### **V. Disposal**

45. In final disposal of this cause, this court issues the following orders: -
- a) The claimant is awarded a total of Kshs.112,117.35 made up as follows –
- i. Underpayments ..... Kshs.8,377.20
  - ii. Overtime .....Kshs.103,740.15
  - Total .....Kshs.112,117. 35
- b) Costs of the cause to the claimant.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**DAVID NDERITU**

**JUDGE**

