



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 143 OF 2017

DAVID NGALA OCHIENG.....CLAIMANT

VERSUS

HATARI SECURITY GUARDS LTD....RESPONDENT

JUDGMENT

1. David Ngala Ochieng (the Claimant) was offered employment as a security guard on 1 August 2012 by Hatari Security Guards Ltd (the Respondent).
2. On 10 January 2016, the Claimant resigned before moving the Court on 7 April 2017 alleging breach of contract in respect to underpayments, uniform deductions, house allowance, overtime, leave allowance, unremitted statutory deductions and certificate of service.
3. The Respondent filed a Response on 7 June 2017 and this prompted the Claimant to file a Reply to Response on 20 June 2017.
4. The Cause was heard on 16 September 2019 and 1 March 2021. The Claimant and a General Manager with the Respondent testified.
5. The Claimant filed his submissions on 26 October 2021 while the Respondent filed its submissions on 14 December 2021.
6. The Court has considered the pleadings, evidence and submissions.

Limitation

7. The Respondent contended that the claims advanced by the Claimant for breach of contract (underpayments, uniform deduction, house allowance, overtime, leave allowance and unremitted statutory deductions constituted *continuing injury* and therefore the Court should have been moved within 12 months of cessation as envisaged by section 90 of the Employment Act, 2007.
8. The Respondent cited *Joseph Kamau Nyakarura & 3 Ors v Muhugu Farm Ltd (2017) eKLR* and *Samuel Otiende Lukoko v Shiners Girls High School (2015) eKLR*.
9. The Claimant did not address the plea of limitation in their submissions.
10. It is not in dispute that the Claimant resigned on 1 January 2016 and that he moved the Court on 7 April 2017, more than 15 months after resignation.
11. The Claimant sought underpayments, uniform deduction, house allowance, overtime, leave allowance and unremitted statutory deductions from August 2012 to January 2016.
12. The question therefore arises whether these heads of claim for underpayments, uniform deduction, house allowance, overtime, leave allowance, overtime and unremitted statutory deductions constitute *continuing injury* within the context of section 90 of the Employment Act, 2007.
13. The Court of Appeal had an opportunity to contextualise what constitutes *continuing injury* in *G4S Security Services (K) Limited v Joseph Kamau & 468 Ors (2018) eKLR*.
14. In the case, the employer had raised a preliminary objection that the claims for reliefs on terminal dues which had accrued 3 years prior to

the institution of the suit were time-barred.

15. The Court stated:

In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. *The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding 'a continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof.* The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

16. The reasoning of the Court of Appeal appears to be that a contractual benefit which accrues at the end of each month amounts to *continuing injury* for purposes of the law of limitation.

17. Consequently, this Court finds that the dues sought by the Claimant accrued at the end of each month and therefore he should have moved the Court within 12 months of 1 January 2016.

18. These heads of the claim are caught up by the law of limitation.

19. The Court also notes that the National Social Security Fund Act and the National Hospital Insurance Fund Act have provisions for dealing with unremitted deductions, but the Claimant did not show that he attempted to make use of those options before moving the Court.

20. The Court further notes that the Claimant was paid using a daily rate which incorporates house allowance as contemplated by the Regulation of Wages (General) Order.

Certificate of Service

21. A Certificate of Service is a statutory entitlement and the Respondent should issue one to the Claimant within 21-days.

Conclusion and Orders

22. Save for a Certificate of Service which the Respondent should issue within 21-days, the Cause is dismissed with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF JANUARY, 2022

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant P.D. Onyango & Co. Advocates

For Respondent G.N.K & Associates Advocates

Court Assistant Chrispo Aura