



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 145 OF 2017

MICHAEL O. OLEWE.....1st CLAIMANT

CHARLES MUMA JUMA.....2nd CLAIMANT

LANGAT BENARD.....3rd CLAIMANT

RICHARD K. BII.....4th CLAIMANT

DAVID LANGAT.....5th CLAIMANT

RONO BETT NICHOLAS.....6th CLAIMANT

BENARD NGENO KIPKIRUL.....7th CLAIMANT

MICHAEL O. ODHIAMBO.....8th CLAIMANT

JOSHUA O. MITA.....9th CLAIMANT

ROBERT KIMUTAI CHEPKWONY.....10th CLAIMANT

KEFA OKELLO OPANDE.....11th CLAIMANT

WESLEY LANGAT.....12th CLAIMANT

MICHAEL OCHIENG BONYO.....13th CLAIMANT

JOSEPH BETT.....14th CLAIMANT

DAVID KIPKORIRTUEL.....15th CLAIMANT

PHILEMON C. KITUR16th CLAIMANT

JOEL K. ROTICH.....17th CLAIMANT

NICHOLAS KIPNGETICH NGENO.....18th CLAIMANT

CHARLES KIPKOECH MUTAI.....19th CLAIMANT

HENRY K. LANGAT.....20th CLAIMANT

DANIEL OCHIEL OBANDE.....21st CLAIMANT

GEOFFREY KORIR.....	22 nd CLAIMANT
PAUL K.B. LANGAT.....	23 rd CLAIMANT
WILLIAM OTIENO OWUONDA.....	24 th CLAIMANT
ALBERT KIPKIRUI CHERUIYOT.....	25 th CLAIMANT
TOM OCHIENG NYANDIKO.....	26 th CLAIMANT
JOELKIPMELI TEIGUT.....	27 th CLAIMANT
WESLEY KOSKEY.....	28 th CLAIMANT
PATRICK CHERUIYOT KO-OGO.....	29 th CLAIMANT
STEPHEN K. KIRUL.....	30 th CLAIMANT
WESLEY CHEPKWONY.....	31 st CLAIMANT
EDWIN OUMA ANDEGO.....	32 nd CLAIMANT
PETRO ONGUNDI ODERO.....	33 rd CLAIMANT
ALFRED KIPNGENO MUTAI.....	34 th CLAIMANT
DANIEL KIPKOECH TOO.....	35 th CLAIMANT
DAVID K. CHEPKWONY.....	36 th CLAIMANT
NICHOLAS K. BETT.....	37 th CLAIMANT
DAVID L. BARGAK.....	38 th CLAIMANT

VERSUS

HATARI SECURITY GUARDS LTD.....RESPONDENT

JUDGMENT

1. The 38 Claimants sued Hatari Security Guards (the Respondent) on 7 April 2017 and the Issues in Dispute were stated as:

Unlawful termination, underpayment, leave allowance, house allowance, uniform deduction, pay in lieu of notice, unremitted deductions of NSSF and NHIF and overtime.

2. The Respondent filed a Response on 8 June 2017, and this prompted the Claimants to file a Reply to Response on 20 June 2017.

3. The Cause was heard on 19 February 2019 when the 1st Claimant testified and on 7 October 2021, when the Respondent's General Manager testified.

4. The Claimants filed their submissions on 26 October 2021 while the Respondent filed its submissions on 14 December 2021.

5. The Court has considered the pleadings, evidence and submissions and identified the Issue for determination as examined hereunder.

Limitation

6. It is not in dispute that the Claimants separated with the Respondent on 31 March 2016, and that they moved the Court on 7 April 2017, more than 12 months after cessation of employment.

7. The Claimants sought *underpayments, uniform deductions, overtime, house allowance, leave allowance and unremitted statutory deductions* from 2012 through to 2016.

8. The question therefore arises whether these heads of claim constitute *continuing injury* within the context of section 90 of the Employment Act, 2007.

9. Save for the claim for unfair termination of employment, the Respondent contended that the claims for breach of contract (*underpayments, house allowance, leave allowance, overtime, uniform deduction 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 and since the Court was moved after the lapse of 12-months, the claims were caught up by the law on limitation.

10. 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.

11. The Claimants did not address the plea of limitation in their submissions.

12. 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.

13. Before the trial Court, the employer had raised a preliminary objection that the claims for reliefs on terminal dues which had arisen accrued 3 years prior to the institution of the suit were time-barred.

14. The trial Court held that the terminal dues constituted *continuing injury*.

15. Upon hearing the parties on appeal, the Court of Appeal 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 benefit which accrues at the end of each month amounts to *continuing injury* for purposes of the law of limitation and action should be instituted within 12-months from date of cessation of the injury.

17. Consequently, this Court finds that the heads of claim for *underpayments, house allowance, leave allowance, overtime and unremitted statutory deductions* accrued at the end of each month and therefore, the Claimants should have moved the Court within 12 months of 31 March 2016 that is on or before 1 April 2017.

18. The Court was moved on 7 April 2017 and the Court finds that 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.

20. The Claimants did not demonstrate that they attempted to make use of those options before moving the Court.

21. The Court further notes that the Claimants who cleared were paid accrued leave in cash.

Breach of contract

Uniform deductions

22. The Claimants stated in their witness statements that the Respondent used to deduct Kshs 200/- monthly on account of uniform but despite returning the uniforms, the Respondent had failed to refund the same.

23. The Respondent produced in Court payment schedules to demonstrate that the Claimants who cleared were refunded the uniform deductions and the Court finds no breach of contract.

Certificate of Service

24. A Certificate of Service is a statutory entitlement and the Respondent should issue the same to the Claimants within 21-days subject to clearing as required by the Respondent’s policies in place.

Unfair termination of employment

25. Under section 47(5) of the Employment Act, 2007, it is the burden of the employee to show at the first instance that an unfair termination of employment occurred before the employer is called upon to justify the decision.

26. The employer would satisfy the burden by showing compliance with sections 35(1), 41, 43 and 45 of the Employment Act, 2007.

27. The Claimants case was that their contracts were terminated without notice in that on 31 March 2016, a supervisor visited their work stations and notified them that they should hand over their uniforms because their services were no longer required from the next day.

28. The Respondents on the other hand asserted that a contract it had with Kenya Pipeline Company in Kisumu was terminated and that the company instead awarded it another contract to provide security services in Makindu, and when it attempted to redeploy or transfer the Claimants to Makindu (the new assignment), they declined.

29. The Respondent also contended that the employees who accepted the transfers were deployed and continued in service.

30. To support its case, the Respondent produced a letter from Kenya Pipeline Company Ltd dated 14 March 2016 and transfer letters dated 15 March 2016 to some of the Claimants.

31. On the basis of the letters, the Court is satisfied with the explanation by the Respondent that it is the Claimants who declined to take up the offers to relocate to Makindu, several hundreds of kilometres from their erstwhile stations within Kisumu, and therefore this was not a case of unfair termination of employment.

Conclusion and Orders

32. From the foregoing, the Court finds:

- i) The heads of claims for breach of contract are statute barred and/or unmerited.
- ii) The claim for unfair termination of employment was not proved.
- iii) The Respondent to issue Certificates of Service to the Claimants within 21-days.

33. Save for Certificates of Service, the Cause is dismissed with costs.

34. Pursuant to directions/orders given on 19 February 2019 and 16 September 2019, this judgment to apply to Kisumu Cause No. 142 of 2017, *Benard Koech v Hatari Security Guards Ltd* and Kisumu Cause No. 144 of 2017, *Richard Langat & 2 Ors v Hatari Security Guards Ltd*.

Delivered through Microsoft teams, dated and signed in Kisumu on this 26th day of January 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimants P.D. Onyango & Co. Advocates

For Respondent G.N.K & Associates Advocates

Court Assistant Chrispo Aura