



**Musyoka & 33 others v Insulae Africana Limited & 2 others (Cause  
970 of 2016) [2022] KEELRC 62 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 62 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 970 OF 2016  
B ONGAYA, J  
MAY 13, 2022**

**BETWEEN**

**MICKY MUSYOKA ..... 1<sup>ST</sup> CLAIMANT  
DAVID MALUKI ..... 2<sup>ND</sup> CLAIMANT  
LAWRENCE DZOMBO ..... 3<sup>RD</sup> CLAIMANT  
HEZRON MWAGONA ..... 4<sup>TH</sup> CLAIMANT  
PETER SINGI ..... 5<sup>TH</sup> CLAIMANT  
BENJAMIN MUTUKU ..... 6<sup>TH</sup> CLAIMANT  
FREDRICK SHIKOLI ..... 7<sup>TH</sup> CLAIMANT  
ALI BAKARI ..... 8<sup>TH</sup> CLAIMANT  
BERNARD OKELO ..... 9<sup>TH</sup> CLAIMANT  
LORNA ASIKO ..... 10<sup>TH</sup> CLAIMANT  
SAMUEL KIRINGI ..... 11<sup>TH</sup> CLAIMANT  
JUMA MLALA ..... 12<sup>TH</sup> CLAIMANT  
MSUKO SHOKA ..... 13<sup>TH</sup> CLAIMANT  
CHRISTOPHER NYANJE ..... 14<sup>TH</sup> CLAIMANT  
MKARE NDIRO ..... 15<sup>TH</sup> CLAIMANT  
NIGHTY MUSIMBI ..... 16<sup>TH</sup> CLAIMANT  
STUYVESANT KAZUNGU ..... 17<sup>TH</sup> CLAIMANT  
MWANJE BAYA ..... 18<sup>TH</sup> CLAIMANT  
CHARO MWADUNA ..... 19<sup>TH</sup> CLAIMANT**



JOHNSON SHILINGI .....	20 <sup>TH</sup> CLAIMANT
ERIC TSUMA .....	21 <sup>ST</sup> CLAIMANT
KIBIBI KEA .....	22 <sup>ND</sup> CLAIMANT
DANIEL KIMUYU .....	23 <sup>RD</sup> CLAIMANT
LINDAH OMUHAKA .....	24 <sup>TH</sup> CLAIMANT
ALLAN JUMBALE .....	25 <sup>TH</sup> CLAIMANT
MICKY LEWA .....	26 <sup>TH</sup> CLAIMANT
JOSEPH NZIOKA .....	27 <sup>TH</sup> CLAIMANT
RAYMOND CHAI .....	28 <sup>TH</sup> CLAIMANT
ENOCH BUNGUA .....	29 <sup>TH</sup> CLAIMANT
MOSES WEBUYE .....	30 <sup>TH</sup> CLAIMANT
SAID MWERO .....	31 <sup>ST</sup> CLAIMANT
FELIX MUTHUI .....	32 <sup>ND</sup> CLAIMANT
JACKLINE NJERI .....	33 <sup>RD</sup> CLAIMANT
SAMSON LESHAN .....	34 <sup>TH</sup> CLAIMANT

**AND**

INSULAE AFRICANA LIMITED .....	1 <sup>ST</sup> RESPONDENT
PANGONI HOTELS AND RESORT LTD .....	2 <sup>ND</sup> RESPONDENT
PANGONI BEACH .....	3 <sup>RD</sup> RESPONDENT

**RULING**

1. The claimants filed the memorandum of claim on December 22, 2016 through Kitonga Kiiwa Advocate of Kituo Cha Sheria. The claimants pleaded as follows. They were employed by the respondents by written contracts whose particulars are known to the parties. Their respective contracts were terminated without notice and it was unfair and because their terminal dues were as well not paid at all. With reference to their respective dates of employment and basic salary each claimed (for 1<sup>st</sup> to 30<sup>th</sup> claimants) upon the headings of leave days earned but not taken; payment in lieu of notice; severance pay for years served; salary arrears for 7 months; 12 months' gross pay in compensation. The 31<sup>st</sup> claimant prayed for salary arrears for unspecified period plus 12 months' salary in compensation; the 32<sup>nd</sup> claimant salary arrears plus 12 months' salary compensation; and 33<sup>rd</sup> claimant payment in lieu of notice, salary arrears and 12 months' salary compensation. There was no particularised claim for the 13<sup>th</sup> claimant. The claimants pleaded that each was entitled to a termination notice and each was entitled to a certificate of service. The particulars of claims were computed in the statement of claim. They prayed for judgment against the respondents for:
  - a. An order compelling the respondent to pay the claimants all their dues as calculated in the memorandum of claims and all pending statutory dues.



- b. The respondent to issue a certificate of service to each claimant.
  - c. Damages for unfair and wrongful termination.
  - d. Costs of the suit.
2. The 2<sup>nd</sup> to 32<sup>nd</sup> claimants signed authorising the 1<sup>st</sup> claimant to swear the verifying affidavit, any further affidavits and to make statements in support of the claims.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents reply and defence was filed on 07.02.2017 through Kosgey & Masese Advocates. The 1<sup>st</sup> respondent admitted that it employed the claimants by way of letters of appointment in capacities and at salaries as pleaded in paragraph 3 of the reply and defence. It was a term of the contract that upon successful completion of the probationary period the employee's appointment would be confirmed and either party could terminate the appointment by giving to the other party one-month notice or one-month salary in lieu of notice and, "However, the 1<sup>st</sup> respondent reserved the right to instant dismissal for lawful cause." Further, claimant 34 resigned from his duty without notice and claimant 33 was summarily dismissed for failure to report at work. The 1<sup>st</sup> respondent denied the claims and stated that the contracts were lawfully terminated and all dues to various claimants were duly paid.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents pleaded that they were not party to the contracts of service and they were therefore non-suited. The 1<sup>st</sup> respondent denied the amounts of salary and claims made and the proper dates of appointment and that the correct dates were as pleaded in paragraph 4 of the defence. The claims were not clear and the same ought not be entertained. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents pleaded that they were strangers to the claims and prayers made for the claimants. The respondents prayed that the suit be dismissed with costs.
5. The respondent did not call a witness and despite opportunity, did not file final submissions. The claimants' witness was Raymond Chai Johnson (CW). His testimony was that the respondent (without being specific of which of the three respondents) employed the claimants. The claimants worked without pay from January 2016 and they complained to the general manager. On September 20, 2016 they found a notice saying there was new management and they were told they had been laid off. They were told new management would pay their dues but despite following up, the dues were never paid. The labour officer failed to resolve the dispute and they filed the suit. CW testified that he was the human resource manager at the material time responsible for preparation of the letters of staff appointment CW testified that the claimants were on permanent and pensionable terms.
6. The court has considered the pleadings, evidence and final submissions and makes findings as follows.
7. The 1<sup>st</sup> issue is to determine the claimants' employer. The 1<sup>st</sup> respondent has admitted that it was the employer and the exhibited letters show the claimants were deployed to work in establishments going by names similar to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. The court finds that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were necessary parties towards efficient, just and complete determination of the suit but they were not the employers. The 1<sup>st</sup> respondent was the sole claimants' employer.
8. The 2<sup>nd</sup> **issue** is whether the claimants are entitled to the remedies as prayed for. CW's testimony is that the employment ended when the management changed. The exhibited contracts show that the parties could terminate by paying a month's salary or giving a month's notice which was not done. It also appears from CW's evidence that the separation was by agreement that the new management would pay their final dues. The claimants left happily and their case appears to be that they were disappointed when the promise that the new management would pay their final dues was not honoured. In the



circumstances the court finds that the termination was not unfair but was by mutual agreement and understanding.

9. However, parties agreed on notice pay which appears not to have been honoured. The court awards each claimant one-month basic pay at the rates pleaded in paragraph 4 of the reply and defence to be included in the decree flowing from this judgment. The court finds that the respondent pleaded that one employee was dismissed and another resigned but no evidence was provided and CW's evidence that they all left on the same date is upheld. The prayer on one-month basic pay is granted except for claimants who did not specifically claim it in the memorandum of claim and to be reckoned accordingly in extracting the decree.
10. The court finds that no evidence has been provided to justify award of the claims under leave days due. Those were special damages requiring particularised pleadings and strict prove but which was not done at all.
11. CW testified that they were not paid since January 2016 to September 20, 2016 – making 8 months and 20 days. CW was claimant No 28 and he claimed salary arrears for 7 months just like for several of the other claimants. There appears to be no evidence that the salaries were paid as now claimed. The respondent pleaded but offered no evidence that the salaries now claimed had been actually paid. The court finds that the claim has been established on a balance of probabilities as claimed and prayed for and computed as 7-months multiply by sum of house allowance and basic pay for each claimant and to be included in final decree.
12. While praying for severance pay, the claimant's case was clearly about not being given a termination notice and they must be bound by that pleading and severance pay under section 40 of the [Employment Act, 2007](#) is found not available in the circumstances of this case. In any event the court has found that the claimants agreed to leave and be paid terminal dues by the new management and that failure is their grievance and in particular, per their pleading and CW's evidence, they had not been given the due termination notice. Each claimant is entitled to a certificate of service. The court has considered the parties' respective margins of success and all circumstances of the case and the 1<sup>st</sup> respondent will pay 50% of the claimants' costs of the suit and the respondents to bear own costs of the suit.
13. In conclusion judgment is hereby entered for the claimants against the 1<sup>st</sup> respondent for:
  1. The 1<sup>st</sup> respondent to pay each claimant one-month basic salary at the rates pleaded in paragraph 4 of the reply and defence filed herein on February 7, 2017, plus, each claimant's salary arrears being 7-months multiply by sum of monthly house allowance and basic pay, (both computed and included in final decree herein) and to be paid by July 1, 2022 failing interest to run thereon from September 20, 2016 (date of separation) at court rates until full payment.
  2. The 1<sup>st</sup> respondent to deliver each claimant's certificate of service by July 1, 2022.
  3. The 1<sup>st</sup> respondent to pay 50% of the claimants' costs of the suit and the respondents to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

