



**Odhiambo & 4 others v Total Security Surveillance Limited (Cause 209 of 2016) [2022] KEELRC 63 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 63 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 209 OF 2016  
B ONGAYA, J  
MAY 13, 2022**

**BETWEEN**

**PETER OTIENO ODHIAMBO ..... 1<sup>ST</sup> CLAIMANT  
MUTINDA SINGI ..... 2<sup>ND</sup> CLAIMANT  
JUSTINE MWANDEZI MWATUKU ..... 3<sup>RD</sup> CLAIMANT  
NEBART AKIDIVA MENGESA ..... 4<sup>TH</sup> CLAIMANT  
DAVID MUREITHI MWANGI ..... 5<sup>TH</sup> CLAIMANT**

**AND**

**TOTAL SECURITY SURVEILLANCE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimants filed the memorandum of claim on March 22, 2013 through Odhiambo S.E & Company Advocates. it is not disputed between the parties that the respondent employed the claimants as guards. They were deployed a KPLC premises when on the night of July 18, 2019 it was reported that a theft of cables occurred at the premises. They were all arrested and charged with the offence of theft.
2. On July 6, 2016 the respondent filed a preliminary objection through Njeru & Company Advocates that the suit was time barred. The respondent also filed a memorandum of response stating that the respondent was never aware that the claimants had been arrested and charged with the offence about theft of the cables and in any event the complainant was KPLC. The respondent's case was that the claimants absconded duty effective September 19, 2011 and never reported to the respondent until they filed the suit. Thus the suit was time barred under section 90 of the *Employment Act*, 2007 because it was filed long after lapsing of the three years of limitation running from September 19, 2011 when the parties effectively separated. It appears that the preliminary objection was not determined as it was premised on disputed fact about the date the parties' contract of service ended.



3. The respondent filed amended response to the memorandum of claim on July 10, 2017.
4. The claimants filed an amended statement of claim on 05.07.2017. The claimants' case is that the criminal case No. 2827 of 2011 at Mombasa against them following the alleged offence of theft or failure to prevent theft was concluded on April 29, 2015 and they were acquitted. The further case was that the respondent had not determined their fate and had not allowed them to resume duty after the acquittal. They had not been given a termination notice. They each claim payment of one-month salary in lieu of notice; 12 months' compensation for unfair termination; terminal benefits; salary for September 2011; underpayment for May 2011 to September 2011; costs of the suit and interest.
5. The Court has considered the claimants' testimony. It is that after the arrest they never visited the respondent's offices because their boss had branded them thieves. The evidence is consistent with their claims for unpaid salary and underpayment only up to September 19, 2011. The Court finds that by claimant's evidence and pleading, they were constructively terminated on September 19, 2011 when the relationship became untenable following their arrest and arraignment. That being the case, the Court finds that as urged for the respondent, the suit was indeed time barred under section 90 of the *Employment Act*, 2007. It is liable to dismissal. Considering all circumstances of the case, each party to bear own costs of the suit.
6. In conclusion the claimants' suit is hereby dismissed with orders each party to bear own costs.

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

**BYRAM ONGAYA**

**JUDGE**

