



Ekesa & 3 others v Senaca East Africa Limited (Cause 605, 607, 611 & 612 of 2017 (Consolidated)) [2022] KEELRC 1747 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1747 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 605, 607, 611 & 612 OF 2017 (CONSOLIDATED)**

B ONGAYA, J

JUNE 24, 2022

BETWEEN

**JACOB WERE EKESA 1ST CLAIMANT
BERNARD MWANTHI PETER 2ND CLAIMANT
NCHOROGE MOGEDI NYANGENYA 3RD CLAIMANT
EVANS NYARERU NYARERU 4TH CLAIMANT**

AND

SENACA EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The 1st, 2nd, 3rd, and 4th claimants filed their respective cases against the respondent separately being Causes Nos 605, 607, 611, and 612 all of 2017 and through Otieno Asewe & Company Advocates. The suits were filed on June 27, 2017.
2. The 1st claimant Jacob Were Ekesa alleges that the respondent employed him in 2012 as a day security guard at Kshs 10,000.00 and deducted to Kshs 6,800.00. Further on August 1, 2015 he was informed that his contract had expired and his services would not be needed any more. The dismissal got him unawares and he alleges unfair, unlawful and unconstitutional termination contrary to sections 35, 43, and 45 of the *Employment Act*, 2007. He makes claims as follows:
 - a) One-month payment in lieu of the notice Kshs 9,780.00.
 - b) Gratuity for 3-years served 18-days x 3-years x 376 days = Kshs 20,304.00.
 - c) Years of service 15-days x 2years x 376 = Kshs 11,285.00.
 - d) Underpayment for 4 years 2012 to 2015 as pleaded (Kshs 16, 020, 35, 760, 35, 760, and 49, 848.00).



- e) Compensation for unfair termination Kshs 9, 780.00 x12 months = Kshs 117, 360.00.
- f) Total claimed Kshs 296, 117.00.
3. The other claimants made similar pleadings and claims upon the same headings, the 2nd claimant claiming a sum of Kshs 371, 004.00 having worked from June 1, 2012 to August 1, 2015 as a security guard; the 3rd claimant a sum of Kshs 472,371.00 and having worked from September 2008 to August 1, 2015 as a security guard; and the 4th claimant a sum of Kshs 472,371.00. Each claimant prayed for payment of the money as claimed, costs and interest of the suit, a declaration the termination was unjust and unfair, and, any other relief that the honourable court may deem just to grant.
4. In each suit, the respondent filed a memorandum of response on October 6, 2017 and through its Human Resource Manager Walter Musi. The respondent subsequently appointed Kimani Wanjohi Muli to act in the matter. The respondent pleaded as follows. The respondent signed a contract with Kenya Ports Authority (KPA) effective March 1, 2011 for a period of 2-years ending on March 1, 2013 to provide security services. It also signed another contract with Milly Glass Works Limited (Mombasa) to provide security services effective March 1, 2011 for two years ending on May 1, 2013. The respondent then employed the claimants as security guards for the tenure of the out sourcing contracts, particularly the one with KPA. Each was issued a dispatch slip and each was employed as a reliever security guard for definite and specific period of time and operationally, each worked for 21 days with 4 paid off days and with a further 5 days as unpaid leave per month served.
5. The respondent's further case is that on December 19, 2013 the respondent had made a decision to withdraw all security services for KPA on account of failure to pay the respondent for services rendered and since December 19, 2013 the client service contract was withdrawn and thereafter the claimants raised no complaint with the labour officer per section 47 of the *Employment Act*, 2007 to alleged unfair termination. Upon termination of the service agreements the claimants were required to report to the respondent's office for further directions but they failed to do so. Instead, they stayed away with the respondent's uniforms and no clearance was done signifying termination of the employment relationship. The respondent further pleaded and urged as follows:
- a) The claimants' contracts of employment were specific and hinged on the provisions of services to KPA, Tea Warehouse Limited and Milly Glass Works Limited that were terminated by the respondent clients in the year 2013.
- b) The cause of action was time barred and filed out of the period of limitation.
- c) The respondent had no other assignments for provision of security services within Mombasa region and all terminated employees were to be re-assigned in Nairobi where major operations were centred and a memo was fixed at the respondent's Mombasa office advising all security guards accordingly.
- d) The respondent denied that the claimants were entitled as claimed and prayed.
6. The respondent prayed that each suit filed for the respective claimants be dismissed with costs.
7. The claimants testified to support their respective cases. The respondent's witness (RW) was Mercy Bonareri, the respondent's Human Resource Manager. Final submissions were filed for the parties. The court has considered all material on record and returns as follows.
8. To answer the 1st issue, the court returns that the parties were in a contract of employment. The respondent employed the claimants as security guards. The evidence is that the claimants were



employed as security guards and based on the contracts between the respondent and its clients for the respondent to provide outsourced security services.

9. To answer the 2nd issue for determination, the court returns that the evidence is that the contracts of service ended when the respondent's outsourcing contracts with his clients also lapsed, and, the claimants failed to avail themselves for redeployment. CW1 testified,

“As at termination assignment ended. We were told to go home to wait for communication on phone to resume duty. I never got such report or communication. I have nothing to show termination. There was no termination letter. We were not told to go to Nairobi to be reassigned. We were told to go home and wait for telephone communication. I never saw a memo saying I report to Nairobi to be reassigned. I returned all respondent's property. There was no clearance but respondent's Waswa received all items. I was told to go home on August 1, 2015”.

In re-examination CW1 testified that on August 1, 2015 the assignment with KPA ended and the bank statement showed his last payment was on August 7, 2015 being Kshs 6, 640.00. CW2's evidence was similar as CW1 that on August 1, 2015 the KPA assignment ended and he was asked to go home to be recalled but that never happened as he received no communication. He confirmed he worked in 2014 and 2015 until August 1, 2015. He testified that he had never declined being reassigned to work in Nairobi. CW3's evidence was similar and he testified that the pay roll should show that he was paid until end of July 2015. CW4 testified that on August 1, 2015 he was reassigned to go to work in Nairobi but he did not do so as he was not facilitated to travel from Mombasa to Nairobi as reassigned.

10. RW testified that the claimants' last day at work was on December 30, 2013 and contradicted when she testified that the claimants worked until December 19, 2013. The court has considered the evidence and returns that the contradictory evidence by RW cannot be trusted.
11. The court returns that the claimants' contracts of service lapsed or got terminated on August 1, 2015 on account that the outsourcing contract between the respondent and the KPA was equally terminated so that the respondent had no assignments within Mombasa to deploy the claimants but, had vacancies in Nairobi Region.
12. At the hearing, it was ordered by consent that each claimant to file bank statement for the period April 1, 2014 to August 1, 2015. The claimants did file the bank statements on May 5, 2022 and which show that they continued to earn from the respondent throughout 2014 to July 2015. That shows that indeed, they worked until August 1, 2015. The court finds accordingly.
13. To answer the 3rd issue for determination, the court returns that the termination was not unfair. The court finds that under section 35 (1) of the Employment Act, 2007 the parties were entitled to enter a contract of service for performance of specific assignment without reference to time. In the instant case the claimants were employed as security guards to perform specific work being guarding services as based on the out-sourcing contract between the respondent and KPA or such other clients. By their own evidence the claimants confirmed that the assignment ended and by evidence of CW4, on August 1, 2015, he was reassigned to go to work in Nairobi but he did not do so as he was not facilitated to travel from Mombasa to Nairobi as reassigned. The other claimants denied knowledge of opportunity for such reassignment but by that CW4's evidence the court returns that consequential to lapsing of the respondent's assignment between the respondent and the KPA, on a balance of probability, the claimants knew they had an opportunity for continued service with the respondent but outside Mombasa. Further, the claimants were not keen to undertake the assignment at Nairobi. While making that finding the court has considered that all claimants stated that on August 1, 2015 they met the respondent's management who told them to go home to be recalled and, CW4 testified that the same



date he was told about deployment to Nairobi. It cannot be that only CW4 had the information on redeployment to Nairobi and not all other claimants who appeared to suggest by their evidence that the same predicament confronted them jointly on August 1, 2015. The court notes that the claimants while alleging that they were not recalled after the meeting or encounter of August 1, 2015, they testified that they returned the uniform to respondent's Waswa and it is incredible to suggest that as they did so, they did not address the issue of being recalled. The court has therefore found that the claimants were not keen to be redeployed to Nairobi region with the consequence that each must be deemed to have resigned from the otherwise subsisting contracts of service.

14. In the circumstances the specific assignment the claimants were employed to perform in Mombasa ended, the claimants were offered a redeployment to Nairobi, but they declined. The court returns that the termination of the contracts of service was attributable to the claimants' own decision and the claimants have failed to establish a case for unfair termination as was alleged. The same amounted to constructive termination at the instance of the claimants and it cannot have been unfair as it was as good as amounting to their own resignation. In particular, the court returns that the claimants fully (100%) contributed to the termination of their respective contracts of service and the alleged unfair termination was unfounded. In other words, they have failed to show that the respondent terminated the contracts of service and unfairly so as envisaged in sections 43, 45 and as read with section 47(5) of the Employment Act, 2007.
15. The 4th issue for determination is whether the claimants are entitled to any of the remedies as prayed for. The court finds that the declaration that the termination was unfair and unjust will collapse as unjustified just as the related prayers for 12 months' compensation and one-month payment in lieu of a termination notice. The claimants pray for underpayment from year 2012 to year 2015 (August 1, 2015). The suits were filed on July 27, 2017 and the court returns that the alleged underpayment was a continuing injury which ended on or about August 1, 2015 so that the 12 months of limitation under section 90 of the Employment Act had long lapsed around August 1, 2016. The court returns that the claims on underpayment will collapse as time barred.
17. Turning to service pay, there was no evidence that the claimants were members of NSSF or that NSSF was deducted and remitted. Each is awarded service years as prayed as reasonable under section 35 of the Act and being the 1st claimant Kshs 11,285.00; the 2nd claimant Kshs 21,151.00; the 3rd claimant Kshs 49,354.00; and the 4th claimant Kshs 49,354.00. While awarding that prayer the court has considered RW's evidence thus, "service pay was not paid due to failure to clear."
18. The court has considered all the circumstances of the case and the claimants' margin of success and returns that the respondent will pay 50% claimants' costs of the suit.
19. To answer the 5th issue for determination, the court finds that the notice of preliminary objection filed for the respondent in each suit alongside the memorandum of response was incompetent because it was based on a contested fact, namely, the date of termination or separation. The claimants' case was that the contract of service ended on August 1, 2015 while the respondent pleaded and urged that the contracts ended on December 19, 2013. The preliminary objection in urging the suits were time barred was therefore liable to dismissal with costs because the start date for computing such time of limitation was disputed between the respondent and the claimants. The court ordered on October 25, 2018 that the preliminary objection to be dealt with the substantive claim and it has been found to fail. The respondent will pay costs of the preliminary objection.
20. In conclusion judgment is hereby entered for the claimants for:



1. The respondent to pay the 1st claimant Kshs 11,285.00; the 2nd claimant Kshs 21,151.00; the 3rd claimant Kshs 49,354.00; and the 4th claimant Kshs 49,354.00 being due service pay by August 1, 2022 failing interest to be payable thereon at court rates from the date of filing the suits till full payment.
2. The respondent to pay the claimants' 50% costs of the suit.
3. The preliminary objection is dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 24TH JUNE, 2022.

BYRAM ONGAYA

JUDGE

