



Maungu v Board of Management, Mua Girls High School (Cause 2074 of 2017) [2022] KEELRC 1757 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1757 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2074 OF 2017**

JK GAKERI, J

JUNE 9, 2022

BETWEEN

KATUA TILAS MAUNGU CLAIMANT

AND

BOARD OF MANAGEMENT, MUA GIRLS HIGH SCHOOL RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a statement of claim dated 7th August 2017 filed on 17th October 2017.
2. The Claimant prays for –
 - i. An order directing the Respondent to pay the Claimant
 - a. Kshs.8,189.18/= being the 14 days' pay due for work done in April 2014;
 - b. Kshs.17,548.25/= being the salary unpaid for the month of January 2014;
 - c. Service gratuity for 5 years calculated as follows:
$$\frac{17,548.25}{30 \text{ days}} \times 5 \text{ years} \times 15 \text{ days} = \text{Kshs.43,870.63}$$
 - ii. An order directing the Respondent to pay the Claimant the sum of Kshs.246,310.02/= being the salary underpayment from 1st May 2010 to 31st March 2014;
 - iii. An order directing the Respondent to issue the Claimant with a certificate of service;
 - iv. 5 months accrued leave calculated as follows; For period between 9/9/2008 and 9/9/2009 Kshs.8,105/= For period between 9/9/2009 and 9/9/2010 Kshs.12,098/= For period between



9/9/2010 and 9/9/2011 Kshs.13,610.25/=For period between 9/9/2011 and 9/9/2012
Kshs.15,910.71/=For period between 9/9/2012 and 9/9/2013 Kshs.17,548.25/=
Total Kshs.67,272.21/=

- v. Costs of this suit and Interest on all items pleaded;
 - vi. Any other relief that this honourable court may deem fit to grant
3. The documents were served upon the Respondent on 12th January 2018 and an affidavit of service dated 18th January 2018 filed on 28th March 2018.
 4. The documents elicited no response from the Respondent as is the mention notice dated 11th April 2018 served upon the Respondent on 3rd May 2018 and filed on 18th June 2018.
 5. The suit was certified to proceed as undefended on 19th June 2018.

Claimant's Case

6. The Claimant's case is pleaded as follows:
7. It is averred that the Claimant was an employee of the Respondent. That he terminated the contract of employment by a letter to the Respondent dated 14th April 2014 on the ground that the Respondent had through its secretary accused the Claimant of theft thus frustrating performance of his duties.
8. It is the Claimant's case that he worked as a driver for the Respondent for five years and was underpaid since his salary was below the minimum wage and exclusive of house allowance and did not proceed on leave.
9. The Claimant further avers that underpayment were as follows:
 - a. From 1st May 2020 to 30th April 2011 (12 months) he was paid Kshs.8,150/= instead of Kshs.12,098/=, an underpayment of Kshs.3,948/= Kshs.47,376.00
 - b. From 1st May 2011 to 30th April 2012 (12 months) he was paid Kshs.9,000/= instead of Kshs.13,610.25/=, underpayment of Kshs.4,610.25/= Kshs.55,323.00
 - c. From 1st May 2012 to 30th April 2013 (12 months) he was paid Kshs.9,500/= instead of Kshs.15,910.71/=, underpayment of Kshs.6,410.71/= Kshs.76,928.52
 - d. From 1st May 2013 to 31st December 2013 (8 months), February 2014 and March 2014 (10 months) was paid Kshs.10,980/= instead of Kshs.17,548.25/=, underpayment by Kshs.6,668.25 Kshs.66,682.50
10. It is further averred that the Respondent did not pay for the month of January 2014 and 14 days in the month of April 2014 prior to his resignation.

Claimant's Evidence

11. The Claimant adopted the witness statement and testified that he worked as a school bus driver at Mua Girls High School from 9th September 2008 as an employee of the Board of Management of the school, until April 2014 when he resigned citing frustration by the Principal.
12. It is the Claimant's testimony that before resignation he had written severally to the Board of Management for a salary increment to be in tandem with the minimum wage but got no response.



That subsequently, he was accused of having stolen parts of the school bus but had not and was neither arrested nor charged.

13. That on 13th January 2014, the Principal informed him that his employment had been terminated by the Board but when the Claimant wrote to the Board he was instructed to resume duty and worked in February 2014 to 14th April 2014 when he resigned.
14. The Claimant testified that the demand for terminal dues had not been responded to and has been unable to secure employment owing to the lack of a certificate of service.

Claimant's Submissions

15. The Claimant identifies three issues for determination including costs:
 - i. Whether the Claimant was unfairly and constructively terminated from employment?
 - ii. Whether the reliefs sought should be awarded?
 - iii. Whether costs should be awarded?
16. As to whether the Claimant was constructively dismissed, the Claimant relies on Sections 45 (wrongly stated as Section 41) to underscore the grounds on which employment may be terminated and Section 44(4) on gross misconduct. These provisions are relied upon to urge that the reasons for termination must be valid and the termination must be conducted in accordance with a fair procedure.
17. According to the Claimant the fact that he wrote to the Board who directed that he resume duty in February 2014 and then resigned in April 2014 implied that he was constructively dismissed.
18. The decision in *Lear Shighadi Sinoya v Avtech Systems Limited* [2017] eKLR is relied upon to emphasise the essence of constructive dismissal.
19. Further reliance is made on the provisions of Section 47(5) of the *Employment Act* to urge that the Claimant had proved that his termination was substantively and procedurally unfair and amounted to constructive dismissal in that the Respondent did not respond to the demands for salary arrears. That he was accused of theft but was not charged, which forced him to resign. That since the Respondent had not responded to the claim it is uncontroverted.
20. The provisions of Section 43 of the *Employment Act* and the decision in *Samson R. Karubara & another v Wrigley Company E.A. Limited* [2018] eKLR are relied upon to urge that termination of employment must be conducted in accordance with fair procedure.
21. On reliefs, the decision in *Joseph Mairura Mong'oni v Kenya Commercial Bank Ltd* [2019] eKLR is relied upon to urge that the Claimant is entitled to pay in lieu of notice.

Analysis and Determination

22. From the pleadings, evidence on record and submissions by the Claimant, the issues for determination are whether: -
 - a. The Claimant was constructively dismissed;
 - b. The Claimant is entitled to the reliefs sought.
23. Before delving into the issues discernible from the pleadings, evidence and submissions, it is elemental to determine whether the suit herein is statute barred which raises the issue of jurisdiction of the Court to entertain the suit.



24. This is a threshold question that runs to the Court’s jurisdiction to entertain a suit before it and is determinative of how the Court proceeds. As articulated by the Court of Appeal in its locus classicus pronouncement on jurisdiction on the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

25. There is no dispute that the Claimant was an employee of the Respondent from 2008 until 14th April 2014 when he resigned. The written statement which the Claimant adopted is clear cut that “I resumed work in February 2014 and worked till 14th April 2014 when I tendered my resignation.”

26. Relatedly, the statement of claim dated 7th August 2017 was filed on 17th October 2017 approximately three years, five months and twenty six days.

27. Section 90 of the *Employment Act*, 2007 provides that:

Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

28. In numerous decided cases, this Court has held that the provisions of the *Limitation of Actions Act* do not apply to employment contracts post the *Employment Act*, 2007 by virtue of Section 90.

29. In *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR the Court stated:

Section 90 of the Act now regulates limitation of time in employment contracts to three years...

Section 4(1) of the *Limitation of Actions Act* is not applicable and therefore the Claimant cannot be heard to argue that the limitation was 6 years.

30. A similar holding was made in *Banking Insurance and Finance Union (K) v Bank of India* [2013] eKLR.

31. Being an undefended suit, there was no party to provide a counter narrative to the Claimant’s case or raise a preliminary objection which in this case would have been apparent on the face of the record.

32. Be that as it may, courts are mandated to enforce the law whether pleaded or not. From the Claimant’s evidence, it is evident that the cause of action arose on 14th April 2014 when he resigned from employment and undoubtedly, time started running and no action was commenced until 17th October 2017 when the instant suit was filed, more than three years after the cause of action arose.

33. This is evident from the copies of letters on record. For instance, a copy of a demand letter from the Claimant’s Counsel addressed to the Secretary, Board of Management of the Respondent dated 6th June 2017.



34. Similarly, letters from the Kenya Union of Domestic Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA Workers) addressed to the Principal of the Respondent are dated 15th August 2014 and 13th October 2017 respectively.
35. It is not in contest that the Claimant wrote several letters to the Board of Management of the Respondent on salary adjustment. He wrote on 21st March 2013, 16th May 2013 and a reminder dated 13th November 2013. Regrettably, no response was forthcoming. Secondly the Advocate he consulted wrote a demand letter on 14th May 2014 and the Respondent responded by letter dated 11th June 2014.
36. Strangely, before the Claimant or his Counsel received a response from the Respondent, the Claimant consulted the Advocate on record who dispatched another demand letter dated on 5th June 2014.
37. For the foregoing reasons, it is the finding of the Court that the suit herein is time barred by virtue of Section 90 of the *Employment Act*, 2007 and no leave was obtained to file the claim out of time. The Court so finds.
38. Having found that the claim is statute barred, the substantive issues for determination fall by the wayside.
39. In the upshot, the suit herein is struck out for being statute barred with no orders as to costs.
40. The Respondent to issue a certificate of service within 30 days of this judgment.
41. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF JUNE 2022

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

