



Haller Foundation (Baobab Trust) v Mwanzighe & 8 others (Appeal 20 of 2022) [2022] KEELRC 1197 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1197 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 20 OF 2022**

**B ONGAYA, J
JULY 8, 2022**

BETWEEN

HALLER FOUNDATION (BAOBAB TRUST) APPELLANT

AND

NICKSON MWANZIGHE & 8 OTHERS RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.O. MBEJA, Principal Magistrate delivered on 18.02.2022 in Mombasa CM-ELRCC No. 254 of 2020)

JUDGMENT

1. The appellant filed the memorandum of appeal on March 15, 2022 through Isaac Onyango & Company Advocates LLP. The memorandum of appeal was against the entire judgment by the trial court upon the grounds that the learned trial magistrate erred as follows:
 - 1) That the learned trial magistrate reached a decision that was against the *Constitution*, the *Employment Act*, the *Labour Relations Act*, the *Labour Institutions Act* and the *Employment and Labour Relations Court Act*.
 - 2) That the learned trial magistrate improperly exercised his discretion and or duty by taking into account matters which he ought not to have taken into account and failing to take into account matters he should have taken into account.
 - 3) That the learned trial magistrate erred in law and in fact in failing to consider, comprehend and appreciate the nature of the claim before the court, the weight and the effect of all the evidence tendered by both parties.
 - 4) That the learned trial magistrate erred in failing to appreciate and consider all and or the core issues raised and or render a decision on all the core and or all the issues which had arisen in the pleadings and at the trial.



- 5) That the learned trial magistrate failed to consider and uphold the express admissions by the respondent during the trial on the fixed term contracts and the respondent's refusal to renew the same.
 - 6) That the learned magistrate erred in failing to appreciate and uphold the reasons, manner and circumstances under which the respondent's employment with the appellant ended.
 - 7) That the learned trial magistrate erred in failing to appreciate and determine all the issues which arose in evidence tendered by both parties at the hearing.
 - 8) That the learned trial magistrate erred in finding, insinuating, holding and concluding that the respondent's services or employments with the appellant had been terminated unfairly and unlawfully.
 - 9) That the learned trial magistrate erred in finding that the respondents have proved their case on a balance of probabilities.
 - 10) That that learned trial magistrate erred in his interpretation, adoption and or application of the doctrine of privity of contract to the present case.
 - 11) That the learned trial magistrate erred in failing to consider and appreciate the extent of the complaints the respondents had lodged with labour office and the resolutions and agreements reached and executed therein by the parties.
 - 12) That the learned trial magistrate erred in failing to consider and or appreciate all the aspects, nature, effects and extent of the response to the claim that the appellant had raised before the trial court.
 - 13) That the learned trial magistrate erred in law and fact in making an award for the sum of Kshs. 4,420,548 as sought in the Memorandum of Claim in favour of the respondents
 - 14) That the learned trial Judge erred in arbitrarily making inordinately high and or excessive awards in favour of the respondents not supported by the evidence tendered and the purposes and the objectives of industrial relations.
 - 15) That the learned trial judge erred in awarding the respondents costs and interests for the claim.
2. The appellant prayed for:
- 1) Allowing the appeal and dismissing the respondents' claim against the appellant with costs to the appellants.
 - 2) The respondents to bear costs of the primary claim and the appeal.
3. The court has considered the record of appeal and the parties' submissions.
4. The background to the appeal is as follows. The respondents filed a memorandum of claim on May 21, 2020 through Khatib & Company Advocates. Their case was as follows.
5. They were employed by the respondent at all material time. In the course of their service, they had a dispute with the appellant about overtime without pay and leave due but not granted. The dispute was reported to the labour officer. On October 23, 2017 the respondent entered into an agreement that the unpaid leave days due as at October 23, 2017 shall be compensated as rest days in the cause of their contract until the same were fully compensated as an alternative to cash payment of the unpaid leave and overtime. On December 14, 2017 the respondent terminated the claimant's contracts without



compensating in cash the unpaid leave days and the overtime worked since the appellants were no longer in service. The appellants claimed that the respondent pays overtime at 3 hours every day and leave days of 1.75 days per month. On November 28, 2018 the respondent paid claimants a sum of Kshs. 688, 649.20 being for 11 months for the year 2017 overtime and house allowance hence leaving the other years unpaid. They claimed and prayed against the respondent overtime and untaken leave days for 7 years calculated as Kshs. 688, 649.80 x 9 = Kshs. 4, 820, 548.60; certificate of service; costs of the suit; interest; and any other further relief the court deems fit to grant.

6. The appellant filed a response to statement of claim dated January 18, 2021 and through Isaac Onyango & Company Advocates. The respondent's case was that each appellant was employed on a fixed term contracts the last of which was lapsed in 2016 by effluxion of the agreed term. The respondent pleaded that the suit was therefore time barred under section 90 of the *Employment Act*, 2007. Further, parties held meetings from May 2018 to December 2018 and all claims by the respondents were amicably resolved by conciliation agreements whose terms were duly settle or paid. The respondent pleaded the doctrines of acquiescence and estoppel. Further, by investigation during the conciliation, it was established that some of the claimants were not entitled to overtime. Further, any rights and benefits under contracts of service were modified, clarified, overtaken or vitiated by the conciliation agreements in 2018. By letter of December 10, 2018, each appellant's certificate of service was forwarded to the labour officer. The appellants' demand letter dated April 12, 2019 was received and the replying letter was dated April 12, 2019 and April 25, 2019. The respondent prayed that the suit be dismissed with costs.
7. The submissions on the appeal were filed for the appellant on June 22, 2022 and for the respondents belatedly on July 7, 2022. The court has considered the material on record and re-examined the evidence bearing in consideration that it did not take the evidence by itself. The court makes findings as follows.
8. The 1st issue and main issue for determination of all the grounds of appeal is whether the respondents' suit was time barred under section 90 of the *Employment Act*, 2007. The court considers that the disposal of that issue goes to jurisdiction and is of priority in determining the instant appeal. It is submitted that the trial court erred in failing to consider the appellant's case that the suit was time barred.
9. It was further submitted for the appellant as follows. The respondents pleaded at paragraph 10 of the memorandum of claim that overtime and other terminal dues for 2017 had been paid. RW1 confirmed that position in the testimony. The memorandum of claim was filed on May 21, 2020 and the dues as claimed were for 2016 backwards and the suit was time barred as the 3 years of limitation had lapsed at the time of filling the suit.
10. For the respondents in the belatedly filed submissions, the issue of time barring has not been addressed at all. The court has considered the trial court's judgment and nowhere is the issue of section 90 of the Act and the time barring of the suit discussed – but the appellant having pleaded and submitted on the issue before the trial court.
11. The court has revisited the pleadings and the evidence. It was pleaded for the respondents that on November 28, 2018 the appellant paid respondents a sum of Kshs. 688, 649.20 being for 11 months for the year 2017's overtime and house allowance hence, leaving the other years unpaid. It is therefore obvious to the court that the claim for overtime and leave in the respondents' suit was for 2016 backwards. That cause of action accrued as at December 31, 2016 and the particulars of overtime and leave days as well as the amount subject of the claim are not pleaded and are not proved at all, per the material on record. The court finds that as submitted for the appellant the suit was time barred. Further,



the court considers that overtime and leave as claimed were continuing injuries which ceased on the date the employment relationship ended on December 31, 2017 when each of the claimants opted not to renew the fixed term contracts. If for any reason the continuing injuries ceased on that date, then the 12 months of limitation in section 90 of the Act lapsed on December 31, 2018 for such continuing injuries. It is not the respondents' case that on November 28, 2018 the appellant had acknowledged the overtime and leave claims subject of the instant suit. Accordingly, the court upholds the appellant's case that the trial court lacked jurisdiction to hear, entertain, and determine the suit. By that finding the court returns that the appeal must succeed and the court will not delve into the other grounds of appeal as it would not serve any purpose to do so. While making that finding, for avoidance of doubt, plainly the respondents had not particularised their claims in terms of specifics of the overtime and leave days claimed by each claimant and then by way of evidence, established the same. The appeal is allowed and the trial court's awards found unjustified as urged for the appellant.

12. In conclusion the appeal is hereby determined with orders:

- 1) The appeal is allowed.
- 2) The respondents to pay costs of the appeal and of the suit in the trial court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 8TH JULY, 2022.

BYRAM ONGAYA

JUDGE

