



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Juma & 5 others v Mada Holdings Ltd t/a Baobab Sea Lodge Kilifi (Cause 2 of 2020) [2022] KEELRC 4159 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4159 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE 2 OF 2020
BOM MANANI, J
SEPTEMBER 27, 2022

BETWEEN

DANIEL JUMA 1ST CLAIMANT
BOROKO MWAZONGA KALAMA 2ND CLAIMANT
MARK SHIDA KENGA 3RD CLAIMANT
PETER KAZUNGU KENGA 4TH CLAIMANT
GEORGE MWAMUYE 5TH CLAIMANT
DAVID WAMBUA 6TH CLAIMANT

AND

MADA HOLDINGS LTD T/A BAOBAB SEA LODGE KILIFI RESPONDENT

JUDGMENT

Introduction

1. The Claimants were all employed by the Respondent on diverse dates in the position of security guards. It does appear that this relationship came to a close sometime in the month of June 2016.
2. The circumstances of separation are contested. Whilst the Claimants contend that they were declared redundant in contravention of the applicable law, the Respondent's position is that the all Claimants deserted duty and therefore voluntarily closed the employer-employee relation between the parties.

Facts of the case

3. According to all the Claimants, the respondent employed them as security guards on diverse dates between 2011 and 2012. They were not given written contracts of employment. However, they took up the engagement and worked up to around the middle of 2016 when the Respondent's management



called them individually and notified them of their termination from employment. That the decisions to terminate them were all communicated orally. That apart from being told that the Respondent could no longer afford to pay for their services, no other reason was given to justify termination of their employment.

4. The Claimants testified that during the tenure of their contracts, they were not paid house allowance despite this being a statutory right. Similarly, it was their case that they were not allowed to enjoy leave breaks or off duty days with pay. That every time anyone of them took a day off, his pay for the day would be deducted.
5. It was the Claimants' case that although most of them would receive their pay at the close of the month, this was an aggregation of their daily wages computed at an average of Three Hundred Kenya Shillings (Ksh. 300/=). However, most seemed to agree with the defence that salary could also be paid in two instalments: one in the middle and the other at the end of the month as individual employees desired.
6. On its part, the Respondent denied that it terminated the Claimants' services. According to the Respondent, the Claimants were employed as casuals. As a result, they were free to leave employment as they pleased. And if they did, the Respondent had no responsibility to compensate them.
7. It was the Respondent's case that the Claimants deserted duty after they were asked to account for their misconduct at work. According to the Respondent, evidence of the Claimants' alleged misconduct included wayward behaviour such as sleeping while on duty.
8. It was the Respondent's case that whilst in employment, the Claimants were treated well and in accordance with the applicable law. That their salaries were guided by the applicable Wage Order sanctioned by the Government. It was also stated that the Respondent had staff houses which the Claimants were free to occupy but had elected to stay out of the said quarters. That as such the Respondent should not be penalized for the Claimants' election in this regard.

Limitation of Actions

9. From the pleadings filed, it is alleged that the Claimants were terminated from employment on the following dates: -
 - a. Daniel Juma 15th June 2016.
 - b. Boroka Mwazonga Kalama 15th June 2016.
 - c. Mark Shida Kenga 21st June 2016.
 - d. Peter Kazungu Kenga 25th June 2016.
 - e. George Mwamuye 15th June 2016.
 - f. David Wambua 17th June 2016.
10. Section 90 of the *Employment Act* provides as follows: -

“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.”



11. In essence, this court can only assume jurisdiction over suits in respect of employment matters if the suits are filed within three (3) years of the cause of action arising. The only exception to this legal edict relates to cases where there is continuing injury or damage. In the latter scenario, the matter must be filed within twelve (12) months of the injury or damage complained of ceasing to happen.
12. The cause of action for the Claimants in this cause is premised on the alleged decision by the Respondent to terminate their contracts of employment. It is the Claimants' case that the decision was irregular.
13. For Claimants numbers one (1st), two (2nd), and five (5th), the amended Memorandum of Claim filed on 20th June 2022 indicates that the decision to declare them redundant was taken on 15th June 2016. Consequently, it is on this date that the causes of action in respect of their respective claims arose.
14. In terms of section 90 of the *Employment Act*, as the three Claimants were allegedly terminated on 15th June 2016, they were required to file suit within three (3) years of this date. This period lapsed at midnight on 1 June 4, 2019. Yet, the current claim by the aforesaid Claimants is shown as having been received in court on June 24, 2019 approximately ten (10) days after the matter had been barred by limitation of time as decreed under section 90 of the *Employment Act*.
15. The reality in the foregoing paragraphs appears to affect the claim by the third (3rd) and sixth (6th) Claimants as well. From the amended Memorandum of Claim aforesaid, the causes of action in respect of these two Claimants' claims arose on 21st June 2016 and 17th June 2016 when they were allegedly declared redundant. In terms of section 90 of the *Employment Act*, any suit by these two Claimants based on the aforesaid causes of action was to be filed by the midnight of 20th June 2019 and 16th June 2019 respectively. Yet, the original Memorandum of Claim filed on their behalf was received in court on 24th June 2019 again a number of days after the causes of action had suffered limitation by reason of section 90 of the *Employment Act*.
16. I note that the second (2nd) and sixth (6th) Claimants have indicated in their witness statements that they were terminated in August 2016. However, they did not amend their pleadings (Statements of Claim) to align them with the dates in the witness statements aforesaid.
17. As a matter of law, parties are bound by their pleadings. As a result, a party is not entitled to lead evidence to establish that which is not pleaded. Such endeavour is an exercise in futility. And such is the unfortunate position that the second (2nd) and sixth (6th) Claimants find themselves in.
18. The limitation of actions period stipulated in section 90 of the *Employment Act* is cast in stone. It is incapable of extension by the court (see *John Kipsang Mutai v Teachers Service Commission* [2018] eKLR).
19. The issue of limitation of action being a matter of law, in a sense, goes to the jurisdiction of a court to entertain a matter. Put differently, can a court of law claim jurisdiction over a matter that is filed outside the limitation period provided by law? In *Peter Ambogo Abuso v Nairobi City County [Formerly City Council of Nairobi]* [2021] eKLR, Mbaru J observed that a court has no jurisdiction to address a matter outside the time limitations appointed by law. This position is reiterated by the Court of Appeal in *John Kariuki Maina v Attorney General* [2021] eKLR where the learned Judges stated that the question of limitation of time was a jurisdictional issue.
20. Being a jurisdictional issue, the question of limitation of actions may be raised suo moto by the court notwithstanding that it was neither pleaded nor raised by the parties to the action (see *Pacis Insurance Ltd vs Mohamed F. Hussein*. MSA HCC 92 / 2015 (2017) eKLR). I associate with the above view. Even though neither party raised the issue of limitation in this action, I am nevertheless obligated to



address it once it comes to my attention since it goes to my jurisdiction to entertain the actions by the Claimants I have identified above.

21. With the exception of the claim by the 4th Claimant, the claims by the other Claimants were filed in violation of section 90 of the Employment Act. Accordingly, the court has no jurisdiction to entertain them. They do not lie and are hereby dismissed.

Analysis of the 4th Claimant's case

22. Although the claims by most of the Claimants have fallen by the wayside on account of the law on limitation of actions, the claim by the fourth (4th) Claimant appears to have been filed within time. Consequently, I will consider it on its merits.

23. In respect of this claim, I consider the following to be the issues for determination: -

- a. Whether the 4th Claimant was engaged as a casual employee.
- b. Whether the 4th Claimant's contract of service was unlawfully terminated.
- c. What reliefs ought to issue?

24. On issue number one (1), it appears not in dispute that the Respondent may have hired the 4th Claimant on casual basis. Indeed this fact is supported by the fact that the 4th Claimant's wage was measured against his presence at work per day. He was to be paid only for those days that he reported on duty. And whenever he failed to report, he would not be paid for such day. This arrangement appears to be consistent with the definition of the term "casual labourer" in the Employment Act which describes this type of employee as: -

“..... a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”

25. However, the fact that such employee is paid after intervals that are longer than a day is not necessarily inconsistent with his position as a casual employee. If the parties elect to settle the employee's wages at intervals that are longer than a day but all other legal parameters as will be discussed hereafter remain constant, nothing will affect the casual nature of the engagement (see *Josphat Njuguna v High Rise Self Group* [2014] eKLR).

26. That said, section 37 of the Employment Act provides for the conversion of casual contracts of employment into term contracts irrespective of the intent of the parties so long as certain legal parameters are met. Where a casual employee is engaged on a continuous basis for a period of working days that aggregate to one month, he automatically becomes a term employee. Similarly, a casual contract of employment, by law, converts into a term contract if the employee "performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more."

27. From the evidence presented on the fourth (4th) Claimant, he was employed by the Respondent on 13th of August 2012. At page 44 of the Respondent's list of documents are this Claimant's casual labour cards for the months of September 2012 and December 2012. These two documents show that the 4th Claimant worked continuously for these two months. The same can be said of several other months that followed. It is therefore clear to me that notwithstanding the Respondent's position, the fourth (4th) Claimant became a term employee as early as the close of September 2012. He is therefore entitled to the protection and benefits that are guaranteed under the Employment Act.



28. On the second (2nd) issue, whilst the 4th Claimant asserts that he was asked by the Respondent's management not to report on duty because the Respondent could no longer afford to pay him, the Respondent suggests that the Claimant absconded duty. However, a close analysis of the evidence on record appears to give credence to the 4th Claimant's version of events as opposed to that of the Respondent. For example, in the Claimants' list of documents is the letter by the Ministry of East African Community, Labour and Social Protection, Department of Labour Kilifi County issued to the Respondent on March 27, 2017. The 4th Claimant contends that this letter was summoning the parties to the local labour office to try and arbitrate the trade dispute between them that had been occasioned by the alleged irregular termination of the Claimants. That the Respondent did not attend the sessions at the Ministry. It is noteworthy that during the testimony by the Respondent's witness, he did not challenge the authenticity of this letter or the fact that it related to what the Claimants asserted during their testimony. If it is true that the Claimants absconded duty as asserted by the Respondent, why would they be pursuing arbitration of their alleged unfair termination at the Ministry of Labour?
29. Having regard to the totality of the foregoing, I am persuaded that the separation of the parties was occasioned by the Respondent's decision to ask the Claimants not to report to work. However, it is clear to me that there was neither justifiable cause for this decision nor was it processed in line with the dictates of due process as required under sections 40 and 41 of the Employment Act whatever the reason that triggered the Respondent's action.
30. Even in instances where it is alleged that an employee has deserted duty, it is now generally settled that the employer ought to take steps to close the relation between the parties in a manner that accords with the requirements of due process under the Employment Act. In this regard, the employer ought to demonstrate that he has made effort to ascertain the whereabouts of the absconding employee.
31. It is possible that an employee may fail to report to work for genuine reasons including incapacitating sickness. Therefore, the employer ought to eliminate the possibility of the employee being away for genuine reason by issuing the employee a notice to show cause why he should not be terminated for failing to attend work. It is only if the employee fails to react to the notice or reacts to it in a manner that is unsatisfactory that the employer may terminate him. Otherwise it will be very difficult to verify the employer's assertion that the employee absconded duty for no apparent reason. Decisions in this respect are now abound (see for instance Felistas Acheba Ikatwa v Charles Peter Otieno [2018] eKLR, James Okeyo v Maskant Flower Limited [2015] eKLR and Milano Electronics Limited v Dickson Nyasi Muhaso [2021] eKLR).
32. Although the Respondent asserts that the Claimants deserted duty, there was no evidence of the Respondent having followed the procedure aforesaid in closing the contracts of employment with the Claimants. Absent this evidence, it is clear that the separation of the parties was not in compliance with the law. Accordingly, it is declared that the successful Claimant's employment was unfairly terminated.

Reliefs

33. Having held the successful Claimant's termination as unlawful, I grant him compensation for wrongful termination equivalent to his gross salary for eight (8) months. The successful Claimant has asserted in his witness statement that he was not allowed to proceed on leave for the duration he worked with the Respondent. The statement was adopted in evidence. In addition, this Claimant reiterated the claim in his oral testimony.
34. In response, the Respondent simply denied that the Claimants were entitled to leave as claimed or at all and put them to strict proof of their claim. In the witness statement filed by James Kilile (RW1), no mention is made of whether the Claimants were granted leave days or indeed whether they were



- entitled to them. In cross examination, this witness said that the Claimants were not entitled to leave as they were casual employees. He confirmed that he did not have any leave records in respect of the Claimants.
35. If I understand the defense well, it concedes that the Claimants never took leave. However, it contends that this was lawful because the Claimants were casuals.
 36. As I have demonstrated in the opening sections of this decision, the Claimants ceased being casual employees the moment section 37 of the *Employment Act* applied to them. Consequently, they were entitled to the benefits guaranteed under the Act as other term employee. These include leave.
 37. Section 28 of the *Employment Act* provides for the right of every employee who has served for an uninterrupted term of one year to proceed on leave for a minimum of 21 working days. During this period, the employee is entitled to his full pay. The 4th Claimant became entitled to this benefit as soon as he qualified as a term employee.
 38. Although the 4th Claimant began working in August 2012, the only evidence on record showing that he had converted into a term employee is the casual card for September 2012. It is therefore sensible to consider that for purposes of computing his leave days, the 4th Claimant's year as a term employee commenced from 1st September 2012.
 39. The record shows that the successful Claimant's employment was terminated on 25th June 2016. Consequently, this Claimant had worked for approximately three (3) years and nine (9) months at the time of his termination. I will therefore grant him salary in lieu of leave for the above period.
 40. With respect to housing, whilst the 4th Claimant contended that he was not paid house allowance for the duration he served the Respondent, the Respondent's case was that it provided its staff with staff houses. Consequently, house allowance was not payable. However, the Respondent did not furnish the court with the contract of service between it and the successful Claimant to demonstrate that the latter was a beneficiary of staff housing.
 41. Under section 9 (1) of the *Employment Act*, a contract of service whose duration is equivalent to or exceeds three (3) months must be evidenced in writing. Under section 9 (2) of the Act, the responsibility of ensuring that such contract is reduced into writing and terms thereof clearly spelt out lies with the employer.
 42. From the evidence on record, the successful Claimant's contract of service was undoubtedly covered by section 9 of the *Employment Act*. The contract's tenure having spanned over three years, it ought to have been reduced into writing.
 43. Under section 10 (7) of the Act, if there is a dispute about a term of such contract and the employer fails to produce a copy of the contract, the burden of proving or disproving the disputed term rests with the employer. The question of housing is a term of a contract of service. Thus, in terms of section 10 (7) of the *Employment Act*, the burden lay on the Respondent to prove that it had provided the successful Claimant with physical housing in lieu of house allowance this term of their contract having been contested. No such evidence was placed before the court.
 44. The Respondent having failed to disprove the 4th Claimant's case that he was not paid house allowance, I enter judgment for the 4th Claimant for unpaid house allowance for the period between September 2012 and June 2016. This shall be computed at the rate of 15% of the 4th Claimant's monthly gross salary of Ksh. 9,000/= (see *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR).



45. Finally, let me mention that from the submissions by counsel for the Respondent on the issue of housing, one cannot fail to notice the ambivalence with which this issue was handled. At one point, counsel indicated that the 4th Claimant was not paid house allowance because he was provided with physical housing. And yet at some other point, it was argued that the 4th Claimant was not entitled to this allowance because it was included in his consolidated salary. Quite apart from the fact that the question whether the 4th Claimant's salary was consolidated was not pleaded and no evidence was presented on it, this ambivalence puts to question the truthfulness of the Respondent on the matter.

Final Award

46. In the final analysis I enter judgment for the parties as follows: -

The 4th Claimant

- a) The 4th Claimant's contract of service was unlawfully terminated by the Respondent.
- b) The 4th Claimant is awarded compensation for unlawful termination equivalent to his gross salary for eight (8) months, that is to say, Ksh. 9,000 x 8= Ksh. 72,000/=.
- c) The 4th Claimant is granted house allowance at the rate of 15% of his gross monthly salary for the period between September 2012 and June 2016 totaling Ksh. 60,750/=.
- d) The 4th Claimant is awarded salary in lieu of leave for three (3) years and nine (9) months totaling Ksh. 33,750/=.
- e) The 4th Claimant is awarded costs of the suit.
- f) The 4th Claimant is granted interest on the amount awarded from the date of institution of suit till payment in full.
- g) All the monetary wards above are subject to the applicable statutory deductions as required under section 49 of the *Employment Act*.
- h) All other prayers by the 4th Claimant which are not specifically mentioned are deemed as not granted.

1st, 2nd, 3rd, 5th and 6th Claimants

- a) Claims by the 1st, 2nd, 3rd, 5th and 6th Claimants were instituted outside the three (3) year period stipulated under section 90 of the *Employment Act*. Consequently, these Claimants' causes of action were time barred. The claims are thus dismissed.
- b) Costs of the lost claims by the 1st, 2nd, 3rd, 5th and 6th Claimants are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF SEPTEMBER, 2022

B. O. M. MANANI

JUDGE

In the presence of:



No appearance for the Claimants

Musyoki for the Respondent

ORDER

In view of the directions by the Chief Justice on online hearings, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE

