



**Songoni v Weld-Con Limited (Citation Cause 12 of 2019)  
[2022] KEELRC 12900 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12900 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CITATION CAUSE 12 OF 2019**

**B ONGAYA, J  
OCTOBER 14, 2022**

**BETWEEN**

**CHARLES OMOKEH SONGONI ..... CLAIMANT**

**AND**

**WELD-CON LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on March 8, 2019 through Lumatete Muchai & Company Advocates. The claimant alleged as follows. He was employed by the respondent in July 2007 as a human resource manager at a monthly salary of Kshs 55, 000.00. On February 5, 2015 the respondent purportedly employed him under a fresh contract of service by the letter of offer notwithstanding that his initial employment was subsisting and had not been terminated. The gross salary per letter of February 5, 2015 was Kshs 118, 890.00 per month and Kshs 130, 075.00 per month as at December 31, 2018. By the letter dated November 30, 2018 November 30, 2018 the respondent notified the claimant that his employment had been terminated. The claimant claims his unpaid terminal dues including:
  - a. Severance pay  $Kshs\ 65,037.50 \times 11\ years = Kshs\ 715,412.50$ .
  - b. Leave dues  $Kshs\ 4,335.83 \times 2\text{-days} \times 7\ years = Kshs\ 728,420.00$ .
  - c. Total claim Kshs 1, 443, 832.50.
2. The claimant prayed for judgment against the respondent for the total amount claimed, costs and interest.
3. The respondent filed the memorandum of reply on April 3, 2019 through Daly & Inamdar Advocates. The respondent pleaded as follows. The claimant is not entitled to terminal dues as prayed for. From December 1, 2007 to December 30, 2014 the claimant was engaged as a consultant to provide human



resource related services for which he was paid a fixed monthly amount of Kshs 50, 000.00 against invoices rendered by Songoni Enterprises. The respondent paid the claimant against the invoices net of the withholding Tax per the applicable law and which tax was remitted to the Kenya Revenue Authority (KRA). In 2014 the respondent decided to terminate the consultancy and instead employ the claimant. By the letter of offer dated February 5, 2015 the claimant was employed by the respondent as human resource manager for a fixed term of one-year, renewable at the respondent's discretion. The term contract was annually renewed by the respondent on the same terms for years 2016, 2017, and 2018. The last fixed term contract lapsed on December 31, 2018. By the letter dated November 30, 2018 the respondent informed the claimant of the decision not to renew the contract due to end on December 31, 2018 and payment of leave days accrued but not taken. Further the claimant was never rendered redundant and is not therefore entitled to severance payment as claimed. Further as at November 30, 2018 the claimant had 31 days of untaken leave in respect of which he was duly compensated in cash. Further, even if severance and leave payment would be due, the same must be computed on the basis that he was employed for only 4-years. Further, if leave were to be due for the period 2007 to 2014, the claim in respect of such leave is time barred. The respondent prayed that the suit be dismissed with costs.

4. The claimant testified to support his claims and the respondent's witness (RW) was Thadius Birika Oeri. The final submissions were filed for the parties. The court has considered all the material on record. Pertinent findings are made as follows.
5. To answer the 1<sup>st</sup> issue for determination, the court returns that the parties were undisputedly in a contract of service. The dispute is whether the contract of service ran from the initial relationship stating July 2007 or commenced by signing of offer letter dated February 5, 2015. The respondent's case is that prior to the letter of offer dated February 5, 2015, the claimant was retained as a consultant. Whether the initial period was on consultancy basis or upon a contract of service, the parties are in agreement that they signed the letter of offer of February 5, 2015. That letter replaced the claimant on an annual fixed term contract from February 5, 2015 without reference to the previous service. It was a fixed term contract commencing on January 1, 2015. The court returns that by that contract and in absence of any other material, the parties' previous relationship lapsed effective that date. With respect to that previous relationship, if at all, it was employment relationship, the claimant's purported claims must be found time barred under section 90 of the Employment Act, 2007. While the terms of service may have been translated to fixed term contract, the claimant failed to raise any objection or to file suit about the accruing cause of action, if any. As urged and pleaded for the respondent, the claims for leave and severance payment with respect to any such previous contract of service as ending on December 31, 2014 were time barred because the 3 years of limitation under the section had lapsed when the suit was filed on March 8, 2019. In any event the claimant testified in cross-examination thus, "No contract produced to show I was paid Kshs 55, 000.00 in salary per month. In the disputed contract of July 2, 2007 pay is Kshs 50, 000.00 not Kshs 55, 000.00. I say invoices exhibited for Songoni Enterprises not known to me. I see page R.102 & 104. Charles Songoni is the withholder. I was employed by the respondent from 2007...." The court has considered that claimant's evidence. It is contradictory for the claimant to plead and urge that he was paid Kshs 55, 000.00 per month while at the same time rely on a purported letter of employment (filed as a further list of documents on January 23, 2020) which is not dated and alleging employment commenced on July 2, 2007 at Kshs 50,000.00 per month. The claimant's contradictory and incoherent case cannot be trusted. The respondent's invoices, on a balance of probability, establish that for the period prior to January 1, 2015 the claimant was a consultant and not an employee. The court finds accordingly. While making that finding, the court has considered that at all material times from July 2007 to January 1, 2015 the claimant being a human resource expert had never raised a grievance with the respondent about his rights under the



Employment Act, 2007, if at all, he had been an employee. The court finds that for that period he was indeed a consultant, he knew as much, and his claims with respect to that period must fail.

6. The 2<sup>nd</sup> issue for determination is whether the claimant was unfairly terminated from employment. The evidence is that the claimant signed a fixed term annual contract being the letter of offer dated February 5, 2015 and effective January 1, 2015. The annual contract was renewed by the letter dated January 11, 2016 to run to December 31, 2016; by the letter dated January 4, 2017 to run to December 31, 2017; and by the letter dated January 3, 2018 to run to December 31, 2018. By the letter dated November 30, 2018 the respondent notified the claimant that the contract due to expire on December 31, 2018 would not be renewed. The claimant by that letter was informed that he would be paid salary up to the end of the contract period; the pending unutilised leave days; and a certificate of service would issue. The claimant was paid per the computation at page R 149 as follows:
  - a. Basic pay November 2018 Kshs 130, 075.00.
  - b. Leave pay 31 days Kshs 155, 090.00.
  - c. Month notice (testified by RW as December pay) Kshs 130, 075.00.
  - d. Total Kshs 415, 240.00.
  - e. Less NSSF Kshs. 200.00.
  - f. Less NHIF Kshs. 1, 700.00.
  - g. Less PAYE Kshs. 117, 168.00.
  - h. Total deductions Kshs 119, 068.00.
  - i. Net payment Kshs 296, 172.00.
7. The claimant was paid the sum of Kshs 296, 172.00 by the cheque dated November 30, 2018 exhibited at page R. 150.
8. The court has considered the evidence and finds that the contract of employment lapsed by effluxion of the contractual tenure. The respondent honoured all the obligations under the expiring contract. Consequently, the prayer for leave days for 7-years and severance payment were both unjustified.
9. While the claimant knew he had been paid accruing leave days per the final computation, he nevertheless made an unjustified blanket claim for payment of leave days. It is trite law that special damages are specifically pleaded and strictly proved - but the court finds that the claimant has failed to do so with respect to leave payment as claimed and prayed for.
10. As already found and as submitted for the respondent, there was no severance payment due as there was no established redundancy in terms of section 40 of the Employment Act, 2007 to justify such a claim. The evidence was that the contract of service lapsed when the contractual term lapsed.
11. The court has considered all circumstances of the case. In particular, the respondent failed to expressly document the initial consultancy contract which may have averted the filing of the instant suit. Each party will therefore bear own costs of the suit.
12. In conclusion the claimant's suit is dismissed with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 14TH OCTOBER, 2022.**

**BYRAM ONGAYA**



**JUDGE**

