Siro v Muyundo & 2 others (All being sued in their capacity as Chairperson, Secretary and Treasurer of Ray Of Hope Clinic & Community Centre) (Cause 1108 of 2018) [2022] KEELRC 13256 (KLR) (16 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13256 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1108 OF 2018

BOM MANANI, J

NOVEMBER 16, 2022

BETWEEN

KENNETH OTIENO SIRO ..... CLAIMANT

AND

FLORENCE MANEA M MUYUNDO ..... 1ST RESPONDENT

IRENE WALUSE ..... 2ND RESPONDENT

ROSELINE N SIMIYU ..... 3RD RESPONDENT

ALL BEING SUED IN THEIR CAPACITY AS CHAIRPERSON, SECRETARY AND TREASURER OF RAY OF HOPE CLINIC & COMMUNITY CENTRE

JUDGMENT

1. The Respondent is a Community Based Organization (CBO) operating within Nairobi County. The Claimant has sued the said CBO through its current officials in a bid to recover employment terminal benefits. The suit is resisted by the Respondent.

2. Although the initial Memorandum of Claim described the Respondent as a company, the heading of the document indicates that the suit was instituted against one Florence Maneya Muyundo trading as Ray of Hope Clinic and Community Centre. The crafting of this initial document by the Claimant suggests that he was ambivalent about the legal status of the Respondent. It is not possible that one can be a limited liability company and a natural person carrying on business under a trade name at the same time.

3. Understandably, the Claimant later on amended his pleadings to describe the Respondent as a social welfare group registered under the Ministry of Labour and Social Protection. In the amended

Memorandum of Claim, the Claimant brought on board Florence Manea Muyundo, Irene Waluse and Mary N Simiyu as Chairperson, Secretary and Treasurer of the organization respectively.

4. Currently, there is no legal framework for registering CBOs such as Ray of Hope Clinic and Community Centre outside the provisions of the *Societies Act*, the *Companies Act* and the Non Governmental Organizations Co-ordination Act. Registration of these unincorporated entities by a Ministry in the Executive arm of Government as welfare associations presents a challenge as to their legal standing (Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] eKLR). Consequently, they are not recognized as legal persons capable of suing or being sued in their own names.

5. Legal proceedings by or against such entities can only be instituted by or against their officials or general membership (seeKipsiwo Community Self Help Group v Attorney General and 6 others (supra). Indeed, the officials and membership of the associations, just like in the case of a partnership, carry personal responsibility for the liabilities of the unincorporated entities. In my view therefore, the officials and general membership of the CBO described as ''Ray of Hope Clinic and Community Centre'' having registered it as such carry personal responsibility for the activities undertaken in the name of the organization.

Claimant's Case

6. The Claimant has stated that he was employed by the Respondent CBO as a security guard sometime back in the year 2004. According to the Claimant, he served the Respondent CBO until January 2017 when he resigned from duty.

7. It is the Claimant's case that after he resigned, he expected that the Respondent CBO would pay him terminal duties. These include: service pay; and accrued house and leave allowance.

8. The Claimant asserts that contrary to his expectations, the Respondent CBO did not pay the dues. The Claimant has given details of attempts to recover the alleged dues through the Kenya National Commission on Human Rights and Kituo Cha Sheria. After failure to procure payments from the Respondent CBO, the Claimant elected to file the current suit to compel recovery.

Respondent's Case

9. The Respondent CBO admits that the Claimant was engaged as a security guard sometime in the year 2005. However, the Respondent avers that the engagement was through a series of renewable fixed term contracts with each contract lasting not more than three months. That this remained the case until the parties parted ways in January 2017.

10. The Respondent's Chairperson asserts that throughout the period of their engagement, the Claimant took his leave as required by law. That this was computed in terms of seven (7) day off duty breaks enjoyed by the Claimant during the currency of every three months contract. Where this was not possible, it is indicated that the Claimant was paid in lieu of leave.

11. It is also contended by the Respondent's Chairperson that the contracts of engagement between the parties stipulated that the salary paid to the Claimant was consolidated and inclusive of all other benefits such as house allowance. Consequently, the claim for house allowance is unmerited.

12. The Respondent's Chairperson also asserts that because the Claimant voluntarily left employment, he lost his right to service gratuity. Accordingly, the claim for service pay should be declined.

13. Finally, although not raised in the amended defense or in the evidence of the Respondent's witness, the Respondent CBO has submitted that the claims for house and leave allowances, being continuing injury claims, are in any event time barred under section 90 of the *Employment Act*. As a consequence, they should be declined.

Issues of determination

14. From the pleadings and evidence on record I am of the view that the following are the issues for determination in the cause:-

    a. Whether the Claimant's action is statute barred.

    b. Whether the Claimant is entitled to the reliefs sought in the amended Statement of Claim.

Analysis

15. In this judgment, I have considered the pleadings, evidence and submissions by both parties to the action. I will try and analyze the two issues framed above separately.

16. Regarding the question of limitation of actions, the Respondent's counsel rightly points out that the issue is to be addressed based on section 90 of the *Employment Act* as read with judicial precedent on the subject. The section requires all claims based on a contract of service to be filed within three (3) years of accrual of the cause of action save for causes of action based on a continuing injury or damage which must be presented within twelve (12) months of cessation of the injury or damage. Although this provision appears straight forward, its interpretation has not been uniform.

17. The concept of ''continuing injury or damage'' for instance, remains a rather fluid subject. Some decisions have suggested that any right that accrues in the course of employment but which remains unrealized at the close of the employer-employee relation constitutes continuing injury on account of such pendency. Consequently, suits to enforce such right fall in the category of cases that ought to be filed within twelve (12) months of the injury or damage ceasing (usually understood to mean on termination of the contract of service) (see Johnson Kazungu v Kenya Marine & Fisheries Research Institute [2021] eKLR and John Kiiru Njiiri v University of Nairobi [2021] eKLR).

18. The Court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR aptly captures the minds of those who ascribe to this view in the following terms:-

    ''The learned Judge found that the respondents' claims were for unpaid terminal dues which constituted a continuing injury. He defined 'continuing' based on the English term as 'remain in existence, operation or a specified state'. The learned Judge on this basis held that the terminal benefits once accrued, remained due and owing to the employees continuously until paid.''

19. Yet, there is the contrasting argument which postulates that a claim for benefits that accrue periodically such as house and leave allowances does not qualify as a continuing injury or damage claim. Such benefits, if not settled by the employer at the close of any given month or such other agreed period, constitute a distinct and separate cause of action for which suit may be filed every time there is default. Therefore, any court action to enforce such benefit must be filed within three years of every such default (seeVipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] eKLR). Importantly, the Court of Appeal in the G4S Security Services (K) Limited v Joseph Kamau & 468 others (supra) while commenting on the right of the Claimants to sue in enforcement of their terminal dues appears to validate this view when it expresses itself on the subject as follows:-

''In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the *Employment Act*. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month.''

20. In my humble opinion, the view expressed by the Court of Appeal that terminal dues that accrue on a month to month or other periodic basis during the life of a contract of service do not constitute a continuing injury or damage for purposes of section 90 of the *Employment Act* is correct. And this being the position, I do not agree with the position expressed by the Respondent on this aspect of the case.

21. Having observed as above, the Court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 others (supra) appears to indicate that in cases of non continuing injury or damage claims, the limitation period of three (3) years runs from the date of termination of the contract of service as opposed to the date of default by the employer to settle a particular benefit. Although I have reservations about this view by the Court of Appeal, I am nonetheless bound by it. I will therefore consider the current dispute from this viewpoint.

22. Both parties to the case before me appear to agree that the employment relationship between them was not based on one continuous contract of service running from 2004 (or 2005 as suggested by the Respondent) when the Claimant was first hired to January 2017 when he resigned. Although the Claimant wishes to treat the period between 2004 and 2017 as composite, he nevertheless relies on sample contracts of service which show that for the documented periods, the parties were operating on the basis of distinct fixed term contracts each lasting three months. Indeed this position is confirmed by the Claimant during his cross examination by the Respondent's Advocate. Consequently, I find that the disputants were engaged in provision of labour through a series of successive but distinct fixed term contracts of service with each contract running for up to three months.

23. If the position expressed above is correct, then the Claimant was expected to institute proceedings to recover any unsettled benefits arising from any particular of the several contracts within three years of closure of such contract. Working with the sample contract given by the Claimant covering the period running from 1st October 2006 to 1st January 2007, the causes of action for the three months fixed term contracts running from this time onwards would lapse as demonstrated below:-.

    a. 2nd January 2007 to 1st April 2007 30th March 2010

    b. 2nd April 2007 to 1st July 2007 30th June 2010

    c. 2nd July 2007 to 1st October 2007 30th September 2010

    d. 2nd October 2007 to 1st January 2008 30th Dec 2010

    e. 2nd January 2008 to 1st April 2008 30th March 2011

    f. 2nd April 2008 to 1st July 2008 30th June 2011

    g. 2nd July 2008 to 1st October 2008 30th September 2011

    h. 2nd October 2008 to 1st January 2009 30th Dec 2011

    i. 2nd January 2009 to 1st April 2009 30th March 2012

    j. 2nd April 2009 to 1st July 2009 30th June 2012

    k. 2nd July 2009 to 1st October 2009 30th September 2012

l. 2nd October 2009 to 1st January 2010 30th Dec 2012

m. 2nd January 2010 to 1st April 2010 30th March 2013

n. 2nd April 2010 to 1st July 2010 30th June 2013

o. 2nd July 2010 to 1st October 2010 30th September 2013

p. 2nd October 2010 to 1st January 2011 30th Dec 2013

q. 2nd January 2011 to 1st April 2011 30th March 2014

r. 2nd April 2011 to 1st July 2011 30th June 2014

s. 2nd July 2011 to 1st October 2011 30th September 2014

t. 2nd October 2011 to 1st January 2012 30th Dec 2014

u. 2nd January 2012 to 1st April 2012 30th March 2015

v. 2nd April 2012 to 1st July 2012 30th June 2015

w. 2nd July 2012 to 1st October 2012 30th September 2015

x. 2nd October 2012 to 1st January 2013 30th Dec 2015

y. 2nd January 2013 to 1st April 2013 30th March 2016

z. 2nd April 2013 to 1st July 2013 30th June 2016

aa. 2nd July 2013 to 1st October 2013 30th September 2016

ab. 2nd October 2013 to 1st January 2014 30th Dec 2016

ac. 2nd January 2014 to 1st April 2014 30th March 2017

ad. 2nd April 2014 to 1st July 2014 30th June 2017

ae. 2nd July 2014 to 1st October 2014 30th September 2017

af. 2nd October 2014 to 1st January 2015 30th Dec 2017

ag. 2nd January 2015 to 1st April 2015 30th March 2018

ah. 2nd April 2015 to 1st July 2015 30th July 2018

24. From the above tabulation, it is clear that claims arising from the several contracts ending with that running between 2nd January 2015 and 1st April 2015 became time barred as at 30th March 2018 backwards. Consequently, the only claims, if at all, that the Claimant can pursue under the current suit are those comprised largely in the contracts that were concluded between 2nd July 2015 and January 2017 when he resigned.

25. The other matter to be considered relates to the manner in which the Respondent has raised the question of limitation. This issue was first raised at the stage of Respondent's final submissions. It was not taken up earlier through either the Respondent's pleadings or the evidence. The critical question is whether it is appropriate for the court to entertain the question in the circumstances.

26. If successfully argued, the issue of limitation ousts the court's power to entertain a case. In my view therefore, it is an issue that goes to the court's jurisdiction to entertain a claim outside the limitation

period. As was pointed out in Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR, the issue of jurisdiction can be raised at any stage of the proceedings and in any manner including orally (see also Maisha Mabati Mills Ltd v Ondari & another (Employment and Labour Relations Appeal 152 of 2022) [2022] KEELRC 12932(KLR)). I therefore hold that notwithstanding that the Respondent CBO did not plead limitation in its pleadings nor raise it during trial of the matter it has been properly taken up in the Respondent's final submissions.

27. In relation to issue number two (2), the Respondent's witness argues that the Claimant is not entitled to any of the reliefs sought for a number of reasons. I will consider the objections to the reliefs sought distinctly.

28. On house allowance, the Claimant asserts that he was not paid house allowance for the duration of his employment with the Respondent CBO between 2004 and 2017. On the other hand, the Respondent CBO is emphatic that this claim does not arise for two reasons. First, the Claimant's salary was agreed as ''consolidated and all inclusive.'' This means the salary included house allowance. Second, the claim, being a continuing injury claim, is in any event time barred

29. I have already stated that the benefit of house allowance arises periodically usually at the close of every month. It is therefore not a continuing injury claim as every time the employer fails to remit the allowance for a particular month, a distinct cause of action arises. It is therefore not covered by the twelve (12) months limitation clause under section 90 of the *Employment Act*. The three (3) year limitation period is what applies to this claim.

30. From the sample contracts of service supplied by the Claimant dated 8th May 2004 and 1st October 2006, it is clear to me that the parties executed contracts by which the salary paid was agreed to be ''consolidated and all inclusive.'' The plain and textual meaning of this clause is that the Claimant's salary was inclusive of all benefits including house allowance.

31. Section 31(2)(a) of the *Employment Act* entitles parties to an employment contract to enter an arrangement where the employer pays an employee a consolidated pay package inclusive of house allowance. Consequently, the Claimant having acceded to this arrangement is not entitled to claim house allowance as a standalone benefit.

32. The Claimant has also claimed leave pay for the entire period he worked for the Respondent. However, as I have indicated above, the relation between the parties was governed by distinct contracts. Consequently, the Claimant ought to have sought to recover leave dues for every contractual period within three (3) years of closure of every of the contracts where the benefit remained outstanding. Failure to enforce recovery of the entitlement within the time aforesaid rendered the benefit obsolete by operation of time. As such, the Claimant can only recover, if at all, leave dues for the period after 2nd July 2015.

33. I have considered the evidence by the Respondent CBO that the Claimant had taken his leave days or had been paid in lieu of such leave. However, the leave application forms produced in evidence by the Respondent do not indicate whether the applications were approved. In the absence of evidence of approval it is not possible for the court to hold that the Claimant took leave for the material period commencing 2nd July 2015 onwards.

34. Evidence of leave approvals is ordinarily expected to be within the special knowledge of the employer as it is him who grants the approvals and maintains a record thereof. In terms of section 112 of the *Evidence Act*, the burden is on the employer to prove this fact.

35. The Respondent CBO did not provide any records to demonstrate that it approved leave for the Claimant for the duration falling after 2nd July 2015 and ending January 2017 when he resigned. The leave application forms bear no evidence of approval in the approval sections. Consequently, I find that there is no proof that the Claimant proceeded on leave during this period. Therefore, he is entitled to be paid in lieu of leave for the duration. I will therefore award the Claimant Ksh. 11,999/= being leave dues for the period between 2nd July 2015 and January 2017 computed pro rata.

36. In respect of service pay, section 35(5) of the *Employment Act* provides as follows:-

> ''An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.''

37. On the other hand, regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998 provides for gratuity. It provides as follows:-

a. After five years' service with an employer, the employee shall be entitled to eighteen days pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.

b. An employee who is summarily dismissed for lawful cause or who terminates his services for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity.

38. Service pay under section 35 of the *Employment Act* is distinct from gratuity paid under regulation 17 of Regulation of Wages (Protective Security Services) Order, 1998. A few differences will suffice. First, whilst it is a prerequisite for payment of gratuity under regulation 17 aforesaid that an employee must have been in service for a minimum of five years, there is no similar requirement attached to service pay under section 35 of the *Employment Act*. For one to be eligible for service pay, he only needs to demonstrate that he has been in the service of the employer for at least one full year. Second, whilst gratuity is computed at the rate of an employee's salary for eighteen days for every year worked, the method for computing service pay under section 35 of the *Employment Act* has not been provided.

39. The Respondent has, in some respects, conflated service pay with gratuity. The two are distinct in law. The factors that disqualify an employee from drawing gratuity under regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998 have no application to a claim for service pay under section 35 of the *Employment Act*.

40. Because section 35 of the *Employment Act* does not provide the formula for computing the quantum of service pay, courts usually borrow the formula used to ascertain severance pay under section 40 of the *Employment Act* to arrive at what is payable to an employee as service pay. The formula computes severance pay at the rate of the employee's fifteen days' salary for every year worked. This has often been applied mutatis mutandis to service pay (seeMahamed M. Kimengi v Mega Marketing Limited [2019] eKLR, Kenneth Onialo v Majlis Resort Lamu t/aMajlis Lamu Ltd [2022] eKLR and Wycliffe Juma Ilukol v Board of Management Father Okodui Secondary School [2022] eKLR).

41. That said, section 35 of the *Employment Act* limits eligibility for service pay to employees who have been in continuous service of an employer for a period of at least one year. Such employee is entitled to receive service pay for every year worked.

42. As the Respondent rightly argues, this requirement under section 35 of the *Employment Act* contemplates a situation where an employee serves the employer uninterrupted for at least one year under the same contract of service whether fixed term or indefinite. If understood in this sense, the

section will exclude those employees who serve under fixed term contracts whose tenure falls below one year. It does not matter that the employee has served the employer for an aggregate duration of one year and more if he has done so under separate fixed term contracts during the period. In such case, the employee's service cannot in law be described as continuous even though it may appear as continuous in fact.

43. As demonstrated in evidence, the Claimant's contracts of service were limited to a maximum of three months at a time. Although he served the Respondent for more than eleven years in aggregate, these were made up of several distinct contracts of not more than three months. Consequently, he does not qualify for service pay under section 35 of the *Employment Act*. This claim is thus declined on this account.

44. I award the Claimant interest on the amounts awarded at court rates from the date of institution of the suit till payment in full.

45. The Claimant is awarded costs of the suit.

46. The award is subject to the applicable statutory deductions if any.

47. Because the Respondent CBO was not a legal entity within the meaning of the law, its officials through who it has been sued and its general membership bear the burden of satisfying the decree of the court.

Summary of Award

48. Because the Respondent CBO is not a legal entity capable of suing and being sued in its own names, all litigation for and against it is through its officials and general membership.

49. Limitation of the cause of action herein is determined on basis of the three year and not twelve months limitation period under section 90 of the *Employment Act*.

50. The Claimant is entitled to recover claims that are not time barred spanning between July 2015 and January 2017.

51. The Claimant is awarded pay in lieu of leave totaling Ksh. 11,999/=.

52. The Claimant's prayer for service pay is declined.

53. The prayer for house allowance is declined.

54. The court awards the Claimant interest on the amount awarded at court rates from the date of filing suit till payment in full.

55. The Claimant is awarded costs of the suit.

56. The award is subject to the applicable statutory deductions.

57. The Respondent's officials as sued and general membership are therefore liable to satisfy the decree herein.

Dated, signed and delivered on the 16th day of November 2022

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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