



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 327 OF 2017

FLORENCE MOIGE SIR.....CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The dispute herein revolves around the use of the claimant's photograph and payment of her terminal dues. The claimant seeks the following reliefs against the respondent;

- a) **A declaration that the claimant's picture was used to advertise guardette services without her consent and that the claimant awarded damages.**
- b) **The claimant be paid her terminal benefits as set out in paragraph 17 herein above totaling Kshs 1,088,899/=.**
- c) **The Honorable court to issue such orders and give such directions as it may deem fit to meet the ends of justice.**
- d) **The respondent to pay the costs of this suit.**
- e) **Interest on the above at court rates.**
- f) **The Respondent to be ordered to issue a Certificate of Service to the Claimant in accordance with section 51 of the employment Act, 2007.**

2. The respondent opposed the claim through its memorandum of response dated 25th May, 2018 wherein it contended that the claimant consented to the unrestricted use of her photograph and as such no monies were payable to her. The respondent prayed that the claim be dismissed with costs.

3. The employment relationship is not disputed. It is also not in dispute that the respondent put up the claimant's photograph in the Daily Nation newspapers to advertise for its guardette services.

Claimant's case

4. The claimant testified in support of her case and sought to rely on her statement of claim, witness statement and documents filed before court. She avers that she was employed by the respondent sometimes in April, 1994 after undergoing a two-week training. She averred that in August, 1994, she was called to the head office where she met with Mr. Zepele the then Marketing Manager of the respondent who informed her that her photograph will be put in the Managing Director's office only for internal use. However, she was shocked when she saw her photo in the Daily Nation Newspaper on several diverse dates. It was her testimony before Court that as a result of the publication of her photograph, the respondent received several requests for her services. The claimant averred that she attempted severally to seek compensation from the respondent for the said publication to no avail.

5. The claimant further sates that she served the respondent for 22 years diligently and was never cited for any disciplinary issue. As a result, she claimed that she was entitled to a loyalty award for service for over 20 years. That at the point of retirement, she was informed that the system indicated that she had worked for 8 years as it reflected a termination letter apparently issued to her on or about 20th September, 2006. It was her testimony that she was not aware of any termination hence was surprised to learn of the same. The claimant further stated that she was not paid terminal dues for the years of service. The claimant later abandoned the claim for the loyalty service award conceding that she had received payment in respect of the same.

Respondent's case

6. The respondent denied that the claimant was entitled to compensation for the use of her photograph. The respondent further contended that the claim is time barred. As regards payment of her terminal dues, the respondent through its witness Mr. Zedrick Waweru, asserted that the claimant had been paid all her terminal dues as at 11th January, 2017 and that none was outstanding. Mr. Waweru sought to rely on the respondent's statement of response and his witness statement. He further produced the documents filed by the respondent as exhibits before Court.

Submissions

7. Each party filed written submissions. On her part, the claimant submitted that she is entitled to compensation for the use of her photograph by the respondent for advertisement purposes. She averred that she had proprietary right to the use of her image. She relied on the case of **Jessica Clarise Wanjiru vs David Aesthetics & Reconstruction Centre & 2 others (2017) eKLR**. The claimant submitted that she never consented to the use of her image and that there was no express consent on her part. On this point, she relied on the case of **Wangechi Waweru Mwende vs Tecno Mobile limited; Rogers Ouma t/a Ojwok Photograph (third party) (2020) eKLR** and **Anne Njoki vs KTDA Agency Limited (2019)**. As regards her terminal dues, the claimant contended that the respondent's witness was unable to demonstrate that she had signed any documents acknowledging that the sum of KShs 153,390/= constituted part of her final dues.

8. On its part, the respondent submitted that the claimant consented to the use of her photograph. However, it contended that the same is time barred by dint of section 4(1) of the Limitation for Actions Act. It relied on the case of **Direcon Ltd vs Samai (1991-1998) as quoted in Banking Insurance and Finance Union (K) vs Bank of India** to support this argument. It further relied on the case of **Mukuru Munge vs Florence Shingi Mwawana & 2 others (2016)**. The respondent further submitted that the claimant's claim for salary for September, 2006 was time barred.

Analysis and determination

9. From the pleadings before court, the oral testimonies rendered and the rival submissions by parties, the issues for determination can be distilled as follows;

- a) Whether the claimant is entitled to compensation from the respondent for the use of her photograph?
- b) Is the claimant entitled to the reliefs sought?

Compensation for the use of the claimant's photograph

10. It is not contested that the claimant's photograph was published in the Daily Nation newspapers in 1994 through to 1995. What is in dispute is whether there was consent on the part of the claimant and if the answer is in the affirmative, then was there an agreement by the parties that she would be compensated for the same?. Before I delve into the issue of consent and the attendant liability, it is important to address the issue of time bar which has been raised by the respondent.

11. In the case of **Thuranira Karauri Vs Agnes Ncheche [1997]eKLR**, the Court of Appeal held that the issue of limitation goes to jurisdiction. As a result, I will deal with it first.

12. As the claimant has rightly submitted, the issue herein falls within the category of tortious claims hence **section 4(2) of the Limitation of Actions Act** is relevant hence;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

13. As such, the claimant's cause of action was only alive upto sometimes in August, 1998. Thereafter it was time barred and any claim to that effect could not be sustained.

14. I would add that even if the claim was to be construed as arising out of an agreement between the claimant and the respondent, it would still be unsustainable by dint of **section 4(1) of the limitation of Actions Act** which places a time bar of 6 years, on actions founded on contract. Essentially, the claim would have been rendered moot after August, 2001 or thereabout.

15. In the event, the claimant wanted to breathe life into the claim, she would have applied for the necessary leave to file the claim out of time. There is no proof that this was done as none was presented before Court.

16. Having found that the claimant's claim as regards the respondent's use of her photograph is time barred, I will put it the issue to rest at that juncture for want of jurisdiction.

Whether the claimant is entitled to the reliefs sought?

17. The claimant has claimed several reliefs against the respondent to wit, unpaid salary for September, 2006, terminal dues, underpayment of overtime worked, unpaid leave for August, 2016, unpaid days and off days and I will deal with them successively.

Salary for September, 2006

18. The claimant averred that her salary in the sum of Kshs 14,054/= for September, 2006 was never remitted. This is a claim falling within the purview of section 4(1) of the Limitation of Actions Act as it was based on an employment contract. As I have stated herein, such claims cannot be reopened after the lapse of the limitation period of 6 years. Besides, no leave was obtained to have the same filed out of time. As a result, the same ceased to be actionable in September, 2012. Accordingly, this claim also falls.

Terminal dues

19. The claimant asserts that she is entitled to terminal dues for the 22 years she rendered services to the respondent. In cross examination, she admitted receiving the sum of Kshs 153,390.00 through her bank account. She has not contested this figure as being an underpayment. The only argument proffered in the claimant's submissions is that the respondent did not provide evidence to demonstrate that she signed for the said dues as being final. This argument notwithstanding, she did not provide a different figure and /or tabulation to challenge the manner in which the respondent had arrived at that figure. As such, she has not proved this claim and the same cannot succeed.

Under payment for overtime worked

20. Under this head, the claimant avers that the respondent owes her the sum of Kshs 399,266/= being underpayment for overtime worked. She states that the respondent was paying her overtime allowance at the rate of 3.5 hours while the rate recognized by law is 4 hours.

21. For the reasons set out herein regarding time bar and by dint of section 90 of the Employment Act, any claim that is actionable in this respect can only be with effect from 11th February, 2014 which is 3 years before the institution of this suit, till the date the claimant exited service.

22. That said, the question now is whether the claimant was underpaid during this period.

23. **Regulation of Wages (Protective Security Services) Order, 1998** which is the reference point in this case provides for overtime as follows –

“(1) An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates –

(a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and

(b) twice the normal rate of wages per hour in respect of any time worked on a rest day.”

24. To bring more clarity in the manner and mode of calculating the payable rates as per the order, the court in the case of **Kenya National Private Security Workers Union v G4s Kenya Limited & 2 others; Central Organisation of Trade Unions (K) & 4 others (Interested Parties) [2021] eKLR**, determined as follows;

“The foregoing notwithstanding, the Court wishes to clarify that when tabulating hours worked per week, any hours worked overtime must be converted using the formula in the Protective Security Services (Order) 1998 so that any hours worked beyond working hours on a normal working day are deemed to be 1.5 hours, while any hours worked on a public holiday or rest day are converted at 2 hours for every hour worked”.

25. From the pay slips produced by the claimant before court, it is apparent that there are instances when she was paid at the rate of 1.5 hours and other instances, when she was paid at the rate of 2 hours. This would therefore seem to be completely in tandem with the **Regulation of Wages (Protective Security Services) Order, 1998**.

26. Besides alleging that she has been underpaid, the claimant has not demonstrated or placed any other evidentiary material before court, for instance the relevant CBA to prove that her overtime earnings were below the regulated or the agreed rate. On this account, the claim for overtime underpayment fails.

August, 2016 leave pay

27. The claimant claims the sum of Kshs 14,054/= being unpaid leave for the month of August, 2016. Besides alleging nonpayment, the claimant has not demonstrated how she arrived at this figure. The respondent has produced the claimant's pay slip for August, 2016 which indicate that she was paid “leave travel allowance” in the sum of Kshs 1,000/=. The claimant did not dispute the payment nor did she tender evidence to prove that she was underpaid if at all. In the circumstances, this claim also fails.

Off days (Sundays)

28. The claimant has claimed the sum of Kshs 629,640/= being off days for the 22 years she worked for the respondent. Yet again, the claimant has not furnished evidence to prove that she worked on Sundays (off days) but was not paid for the same. She has merely pleaded for the same but failed to prove her entitlement. In any case, I have noted from her pay slip that there are instances where it reflects payment of overtime at the rate of 2 hours.

29. As stipulated in the **Regulation of Wages (Protective Security Services) Order, 1998**, the applicable rate for a rest day worked is 2 hours for every hour worked. My interpretation is that the instances the claimant was paid at the rate of 2 hours was in respect of the days she

worked when she was supposed to be off duty. I therefore find that the claimant has failed to prove her claim under this head and I decline to make any award in that respect.

30. Against this background, I dismiss the claim in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2021.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Gichuhi for the Claimant

Ms. Odiero for the Respondent

Court Assistant: Barille Sora

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 had 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.

STELLA RUTTO

JUDGE