



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 434 OF 2016

TERESIA WANJIKU NGUGI.....CLAIMANT

VERSUS

KIAMBU INSTITUTE OF SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit by way of a Memorandum of Claim dated 18th February, 2016 and filed in court on the same date through the Firm of G.N. Gichong'i Gichuhi & Co. Advocates.
2. The Claimant further filed an Amended Memorandum of Claim on the 28th of June, 2016, wherein, the Respondent was substituted with Registered Trustees of Kiambu Institute of Science and Technology.
3. The Claimant contends that she was in the service of the Respondent between the years 1983 to 2014.
4. The Claimant's further contention is that the Respondent owes her house allowances amounting to Kshs. 330,000 for the year 1983 to 2011, salary underpayment of Kshs. 965,238, severance pay of Kshs. 130,423 and long service award of Kshs. 150,000.
5. The Respondent filed a response to the Claimant's claim on the 7th of June, 2016, wherein, it strongly denies the claim and further avers that the claim is time barred by the Statute of limitations and other relevant laws of the land.
6. Both parties filed submission in the matter.

The Claimant's Case

7. The Claimant's case is that she was an employee of the Respondent between the year 1983 to 2014, when she retired through normal retirement
8. It is her case that despite serving the Respondent with dedication and devotion for 31 years, the Respondent deliberately refused to pay her terminal benefits.
9. The Claimant's prayer is that judgment be entered in her favour and against the Respondent as follows:
 - i. That the court do find the Respondent's action of continued withholding, failing, refusal and/or neglecting to compute and disburse the rightful terminal benefits, unpaid dues and underpayment is unlawful and untenable.
 - ii. That the Respondent has been in breach of the Employment Act and other relevant Labour laws
 - iii. That as a result the court do order that the Respondent pay the Claimant all her terminal benefits and other unpaid dues computed as hereunder:

A. House Allowance

Years 1983-2006 at Kshs. 1000 per month (Kshs. 1000 X 12X23 years) = 276,000

Year 2009 to 2011 at Kshs. 1,500 (Kshs. 1500X12X3 years)= 54,000

Total house allowance : Kshs. 330,000.00

B. Salary underpayment for 31 years amounting to Kshs. 965, 238.00

C. Severance pay for 31 years at 18 days for every completed year Kshs. 7,012X31 years X18/31 =13,423.00

D. Long service award amounting to Kshs. 150,000.00

Total claim Kshs. 1,575,661.00

The Respondent's case

10. The Respondent denies being the employer of the Claimant and further avers that the suit is bad in law for reason that it does not have capacity to be sued and especially by the Claimant who has never been its employee.

11. The Respondent further case, is that the Claimant was paid all her dues including retirement benefits, salaries and that no dues are owed to her by the Respondent.

12. It is the Respondent's contention that the Claimants claim is time barred by the Statute of limitation.

13. The Claimant testified in support of her case during trial and the Respondent called one Ms. Ruth Wambui Kamau, a Finance officer of the Respondent to testify on its behalf.

Submissions

The Claimant's Submission

14. It is submitted for the Claimant that the Respondent's continued withholding the Claimant's retirement benefits is illegal, unlawful, and a breach of her contract which entitles her to damages, as she has suffered financial embarrassment, inconvenience and has led a less satisfying life since her retirement. She sought to rely on the holding in the case of *Chrisantus Onyain v Standard Chartered Bank (2011) eKLR*

15. It is submitted that the Claimant is entitled to the remedies sought as the dues were never paid during her employment with the Respondent.

16. It is further submitted that the Collective Bargaining Agreement between the Claimant's Union and the Respondent, had clearly provided for payment of house severance pay, yet the same was never paid.

The Respondent's Submissions

17. It is submitted for the Respondent, that the Respondent has a staff pension contributory scheme, where the Claimant contributed to and was paid both her contribution and the employer's contribution upon her retirement. It is further submitted that the Claimant retired through the normal retirement process upon attaining the age of 60 years.

18. It is submitted that the Claimant's salary was guided by the CBA and for this reason there was no underpayment.

19. The Respondent submitted that it was never the Claimant's employer and that she has sued a wrong Respondent and the suit should be dismissed.

20. It is submitted that the claims for house allowance, severance pay and underpayment lacks merit and should be dismissed. It is further submitted that the suit is time barred for having been filed outside the 3 years statutory period per *Section 90 of the Employment Act*. They sought to rely on the case of *G4S Security Services (k) Limited v Joseph Kamau & 468 others*.

The Issues

21. The court identified the following issues for determination:

- i. Whether the Claimant was an employee of the Respondent
- ii. Whether the Claimant is deserving of the reliefs sought

Whether the Claimant was an employee of the Respondent

22. The Claimant's claim filed before court on the 18th of February, 2016, listed Kiambu Institute of Science and Technology as the Respondent.

23. The claim was later amended in June, 2016, wherein, the Registered Trustees of Kiambu Institute of Science and Technology was brought in as the Respondent in place of the earlier Respondent; Kiambu Institute of Science and Technology.

24. The Claimant's testimony was that she was employed by Riara Coffee Farm, but which she claimed to be one and the same as Kiambu Institute of Science and technology as well as the Registered Trustee of Kiambu Institute of Science and technology.

25. The Respondent's witness in her testimony clarified to the court that the Registered Trustees of Kiambu Institute of Science and Technology owned both the Institute and Riara Coffee farm where the Claimant was employed and is indeed the umbrella Institution for the two sub-entities.

26. It is her further testimony that the Registered Trustees, being the owners of Riara Coffee Farm, wrote to the Claimant to notify her of her impending retirement. This is confirmed by the letter of retirement notice dated 18th August, 2014 and which was produced in evidence before court.

27. In a further letter dated 8th December, 2015, produced as evidence in court by the Respondent's witness, the Registered Trustees of the Kiambu Institute of Science and Technology Provident Fund were informed of the Claimant's retirement by the Registered Trustees of Kiambu Institute of Science and Technology, and which letter was signed off by one Aloysius Mungai Muhia, the Chairman of Kiambu Institute of Science and Technology -Board of Trustees of Riara Farm management committee. This letter stated that the Claimant herein was an employee of Kiambu Institute of Science and Technology-Board of Trustees, Riara Farm Unit.

28. Contrary to the Respondent's assertion, their evidence before this court is proof that Kiambu Institute of Science and Technology and Riara Coffee Farm are both entities owned by the Registered Trustee of Kiambu Institute of Science and Technology and the employer of the Claimant.

29. The Claimant having amended her claim to have the Respondent as the Registered Trustees of Kiambu Institute of Science and Technology, indeed sued the right party and the court finds and holds that Claimant was an employee of the Respondent.

Whether the Claimant is deserving of the reliefs sought

30. The Claimant's claim is for payment of House allowances, Salary underpayment, Severance pay and long service award. I will deal with each of the reliefs sought separately.

House Allowance

31. The Claimant in her testimony states that during her employment with the Respondent, she was not paid a house allowance until the year 2012, when the same was included in her pay slip.

32. It is her case that from 1983 to 2011, she was never paid a house allowance and her claim is for the house allowance covering this period.

33. The Claimant admitted during cross examination that the Respondent had given her a house at its servant quarters, but which she moved out of after one year, when she was asked to share the house with another employee of the Respondent.

34. The Respondent position is that the Claimant never raised any issues to do with payment of house allowance, until the time she received her notice of retirement.

35. The Respondent further states that the Claimant vacated the house allocated to her by the Respondent in the year 2012, and that the Respondent paid her a house allowance since then up to the time of her retirement.

36. It is the Respondent's case that it does not owe the Claimant's any money and further that the Claimant's claim is statutory time barred.

37. The claim for house allowance relates to the years 1983 to 2011. The Respondent in their response to claim state that this claim is statutory time barred. *Section 90 of the Employment Act 2007* 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.”

38. From the foregoing provisions of *Section 90 of the Employment Act, 2007*, the Act contemplates two classes of causes of action. First being the one-time injury where the cause of action expires after 3 years and the second is a continuing injury, where the cause of action expires 12 months' next after the cessation of the injury.

39. The Claimant's case is that she did not live in the employer's allocated house from 1983 to 2011 and that she was only paid a house allowance from the year 2012 to 2014 when she retired. Even if the court were to find justifiable reasons for the Claimant's refusal to stay in

the house allocated to her by the Respondent, the cause of action accrued between the year 1983 to 2011. The suit herein was filed in February, 2016, which is between 5 to 33 years after each cause of action accrued.

40. In so far as this claim relates to causes of action that accrued between 1983 and 2011, this claim is time barred under the provisions of *Section 90 of the Employment Act of 2007*. The Court therefore lacks jurisdiction to entertain this claim and the same fails and is dismissed. This was the holding of the court of appeal in the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR* and which was further fortified by the same court in the case of *Attorney General & another v Andrew Maina Githinji and another [2016] eKLR* where in upholding a Preliminary Objection based on *Section 90 of the Employment Act*, Waki JA held as follows:

“...The Respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013.”

Salary underpayment

41. The Claimant claims salary underpayment for the 31 years she was in the service of the Respondent.

42. Part of this claim is time barred for similar reasons as expressed above. The question then becomes whether the Claimant was underpaid in the time between from February, 2014 to December, 2014 when she retired, being the only period that falls within the purview of *Section 90 of the employment Act, 2007*.

43. The Claimant admits being a member of a union and the Respondent states that the salaries paid to the Claimant throughout her time with the Respondent, is that which was agreed upon between the union and the employer (Respondent).

44. The Claimant did not show that she was indeed underpaid compared to other employees in her cadre or that her pay was below that which was agreed upon by her Union and the Respondent. The Claimant was under obligation to prove her claim, which she did not. In the circumstances this claim fails and is dismissed.

Severance Pay

45. The Claimant herein left service through normal retirement on attaining the legal age of retirement. Further, she was a member of a Provident Fund where she and the Respondent contributed into. The evidence before court indicate that she was paid both her pension contribution and the employer's upon retirement. This claim is without merit and is hereby dismissed.

Long Service Award

46. No evidence has been proffered to show that the Respondent had made a promise of such an award, either through contract or Collective Bargaining agreement with the Claimant or her Union. This claim equally lacks merit and is dismissed.

47. In conclusion, this suit is dismissed in its entirety.

48. Considering the age of the Claimant and the fact that she is currently unemployed, I will make no orders as to costs.

49. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF NOVEMBER, 2021

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Ms. Kamau h/b for Mr. Wandaka for the Respondent

Ms. Christine Omollo-C/A